90-425

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL ARMONTROUT, Warden
Missouri State Penitentiary,
Petitioner,

vs.

JAMES W. CHAMBERS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I.

WHETHER THE STATUTORY PRESUMPTION OF CORRECTNESS TO BE APPLIED TO STATE COURT FINDINGS OF FACT, 28 U.S.C. § 2254(D), PROHIBITS FEDERAL COURTS IN HABEAS CORPUS CASES FROM RE-CHARACTERIZING AN ATTORNEY'S PERFORMANCE UNDER *STRICKLAND V. WASHINGTON* AS A FAILURE TO INVESTIGATE, WHERE THE STATE COURTS CHARACTERIZED THE PERFORMANCE AS DELIBERATE TRIAL STRATEGY.

II.

WHETHER AN ATTORNEY CAN BE FOUND TO HAVE RENDERED CONSTITUTIONALLY-DEFICIENT ASSISTANCE WHERE, FOLLOWING HIS APPOINTMENT FOR A RETRIAL AFTER REVERSAL, AND AFTER STUDYING THE TRANSCRIPT OF THE FIRST TRIAL, HE DECIDED NOT TO CALL AS A WITNESS AN INDIVIDUAL WHOSE TESTIMONY THE ATTORNEY BELIEVED WOULD, ON BALANCE, HELP ESTABLISH, RATHER THAN CHALLENGE, THE PROSECUTION'S CASE.

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OPINIONS BELOW

The panel Opinion of the United States Court of Appeals ordering the respondent to be retried or released is reported at 885 F.2d 1318 (8th Cir. 1990) (A-30). The *en banc* opinion is not reported but is included in the Appendix (A-2). The Judgment and Order of the district court also is not reported but is included in the Appendix (A-53).

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Eighth Circuit issued its en banc Opinion on July 5, 1990 (A-2). Pursuant to 28 U.S.C. §2201(c) and Supreme Court Rule 20, the present petition for a writ of certiorari was required to be filed within ninety

days. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

Respondent was convicted of capital murder for which he was sentenced to death. On direct appeal following the original trial, the Missouri Supreme Court reversed the conviction for failure to submit a self-defense instruction and remanded for a new trial. *State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984).

On retrial, respondent did not present a witness, Jim Jones, who had testified at the first trial in support of the self-defense theory. The trial court refused a tendered self-defense instruction. Again the respondent was convicted and sentenced to death. The Missouri Supreme Court upheld the conviction and sentence on direct appeal. *State v. Chambers,* 714 S.W.2d 527 (Mo. banc 1986).

Respondent then sought post-conviction relief pursuant to Missouri Supreme Court Rule 27.26 (repealed effective 1-1-88). The motion court denied relief on the respondent's claims of ineffective assistance of counsel. On appeal, the Missouri Court of Appeals affirmed, finding "that counsel's investigation of potential witness . . . Jones . . . was reasonable under the circumstances and constituted deliberate trial strategy, not a failure to investigate." The court found as follows:

> Counsel had the benefit of Jones' recorded testimony from the first trial. Jones' testimony on cross-examination directly supported the State's theory of the case under the capital murder submission. In counsel's professional opinion the disadvantages of Jones' testimony outweighed the advantages. Appellant assented to this trial strategy and signed a statement attesting to this fact. Counsel felt no need to individually interview Jones as any deviation in Jones' testimony from that given at the first trial would have been subject to impeachment.

Chambers v. State, 745 S.W.2d 718, 721-22 (Mo.App. 1987).

Respondent next filed a petition for a writ of *habeas corpus* pursuant to 28 U.S.C. §2254 on March 23, 1988, in the United States District Court for the Eastern District of Missouri. On July 19, 1988, District Judge William L. Hungate denied the petition, finding in pertinent part as follows:

> The Court finds reasonable counsel's conclusion that Jones' testimony would have tended to support the state's theory of the case and thus his decision not to call Jones as a witness. This is especially true in view of petitioner's written and signed pretrial statement that he agreed with counsel's decision in this regard . . . Furthermore, counsel reasonably assessed the [e]ffect to Jones' earlier testimony on both the state's theory of the case and Jones' credibility as a witness.

(A-62-63).

The Eighth Circuit Court of Appeals reversed, finding counsel ineffective for failing to interview and call Jim Jones as a defense witness. *Chambers v Armontrout,* 885 F.2d 1318 (8th Cir. 1989). Petitioner then filed a petition for rehearing en banc. The petition was granted. Following briefing and argument, the Court of Appeals ruled, on a 6-5 vote, that counsel was ineffective for failing to interview and call Jim Jones as a defense witness (A-2). The court granted the petitioner's motion for a stay of mandate pending this petition for a writ of *certiorari.* (A-1)

ARGUMENT

I.

THE STATUTORY PRESUMPTION OF CORRECTNESS TO BE APPLIED TO STATE COURT FINDINGS OF FACT, 28 U.S.C. §2254(D), PROHIBITS FEDERAL COURTS IN HABEAS CORPUS CASES FROM RE-CHARACTERIZING AN ATTORNEY'S PERFORMANCE UNDER *STRICKLAND V. WASHINGTON* AS A FAILURE TO INVESTIGATE, WHERE THE STATE COURTS CHARACTERIZED THE PERFORMANCE AS DELIBERATE TRIAL STRATEGY.

The central issue in the instant petition concerns the decision of trial counsel, appointed for a new trial after reversal,[1] upon studying the transcipt of the first trial, not to call a witness whose testimony counsel believed would, on balance, serve to establish, rather than challenge, the prosecution's case. The Missouri Court of Appeals characterized counsel's decision as "deliberate trial strategy, not a failure to investigate." *Chambers v. State,* 745 S.W.2d 718, 722 (Mo.App. 1987), (A-112). However, without addressing the statutorily-mandated presumption of correctness, 28 U.S.C. §2254(d), the United States Court of Appeals for the Eighth Circuit found that

> The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.

Chambers v. Armontrout, No. 88-2382 (8th Cir. July 5, 1990) (en banc), (A-8). Petitioner submits that the court's failure to apply the presumption of correctness to the facts of this case requires reversal.

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[1] *See State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984), (A-126).

Ineffective assistance of counsel is a mixed question of fact and law. *Strickland v. Washington,* 466 U.S. 668, 698 (1984); *Couch v. Trickey,* 892 F.2d 1338, 1341 (8th Cir. 1989). A state court's *conclusion* regarding ineffectiveness is subject to *de novo* review in federal *habeas corpus* proceedings. *Strickland v. Washington, supra* at 698; *Couch v. Trickey, supra* at 1341. *See also, Laws v. Armontrout,* 863 F.2d 1377, 1381 (8th Cir. 1988) (en banc), *cert. denied,* ____ U.S. ____, 109 S.Ct. 1944, ____ L.Ed.2d ____ (1989). However, state court findings of *fact* on this issue are presumed correct absent specific enumerated circumstances rendering the presumption suspect. 28 U.S.C. §2254(d); *Strickland v. Washington, supra* at 698; *Sumner v. Mata,* 449 U.S. 539, 543-47 (1981); *Couch v. Trickey, supra* at 1341; *Laws v. Armontrout, supra* at 1381.

The standards governing claims of ineffective assistance of counsel are familiar and straightforward:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

Strickland v. Washington, supra at 687; *Laws v. Armontrout, supra* at 1386. Each prong of this test presents a mixed question of fact and law. *Strickland v. Washington, supra* at 698; *Couch v. Trickey, supra* at 1341. n. 13.

The performance prong logically consists of three elements:

(1) a finding as to *what* the attorney did nor did not do;

(2) a finding as to *why* the attorney acted or failed to act; and

(3) an objective determination as to the *reasonableness* of the act or omission.

The first element obviously serves to establish "that counsel's performance was deficient." *Strickland v. Washington, supra* at 687. The second element establishes whether or not the act or omission was motivated by trial strategy. *Id.* at 689. *See also Swindler v. Lockhart,* 885 F.2d 1342, 1352 (8th Cir. 1989), *cert. denied,* ____ U.S. ____, 110 S.Ct. 1938, ____ L.Ed.2d ____ (1990). The third element applies the Sixth Amendment[2] "counsel" requirement to the first two elements of the performance prong. *Strickland v. Washington, supra* at 687-90.

The Court of Appeals' re-characterization of counsel's performance as failure to investigate involves the second element of the performance prong, i.e., a finding as to counsel's reasons for a particular act or omission. This requires consideration of counsel's intent or motivation.

While this Court does not appear to have addressed the issue directly, petitioner submits that the Missouri Court of Appeals' characterization of counsel's performance as "deliberate trial strategy, not a failure to investigate[,]" *Chambers v. State,* 745 S.W.2d at 722, (A-112) is a finding of fact subject to the presumption of correctness, 28 U.S.C. §2254(d). *See Washington v. Strickland,* 693 F.2d 1243 (11th Cir. 1982) (en banc), *rev'd,* 466 U.S. 668 (1984):

> A finding by the district court as to whether a choice was strategic is a finding of fact that will be accepted by the court of appeals unless clearly erroneous.

Id. at 1257 n. 24, citing, *inter alia, Pullman-Standard v. Swint,* 456 U.S. 273, 287-90 (1982). *See also, Adams v. Jago,* 703 F.2d 987, 980 (6th Cir. 1983). Because the stategy element of the per-

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[2] The Sixth Amendment provides, in pertinent part, that "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. Amend. VI.

formance prong requires discerning an attorney's motivation or intent, such a determination is analogous to findings regarding intentional discrimination and credibility, both of which are matters of fact. *Batson v. Kentucky,* 476 U.S. 79, 98 n. 21 (1986); *Marshall v. Lonberger,* 459 U.S. 422, 433-34 (1983).

This Court dealt specifically with the presumption of correctness, 28 U.S.C. §2254(d), in *Sumner v. Mata,* 449 U.S. 539 (1981) (*Sumner* I). The underlying claim in *Sumner* I involved allegedly suggestive pre-trial identification procedures. *Id.* at 541-42. After the district court denied the petition for a writ of *habeas corpus,* the Ninth Circuit Court of Appeals reversed based upon "findings . . . considerably at odds with the findings made by the California Court of Appeals." *Id.* at 543. There was no suggestion that the record was insufficient in any respect. *Id.*

In reversing that judgment, this Court noted that the

> . . . interest in federalism recognized by Congress in enacting [28 U.S.C.] §2254(d) requires deference by federal courts to factual determinations of all state courts. This is true particularly in a case such as this where a federal court makes its determination based on the identical record that was considered by the state appellate court.

Id. at 547. The Court found that in enacting the presumption of correctness, Congress intended to reduce the friction between the federal and state systems inherent in 28 U.S.C. §2254, and "to ensure that a state finding not be overturned merely on the basis of the usual 'preponderance of the evidence' standard[.]" Consequently, this Court held

> . . . that a habeas court should include in its opinion granting the writ the reasoning that led it to conclude that any of the first seven factors were present, or the reasoning which led it to conclude that the state finding was "not fairly supported by the record."

Id. at 551.

Upon remand for consideration in light of the statutory presumption, the Ninth Circuit held the presumption of correctness inapplicable to mixed questions of fact and law, and "argued that its disagreement with the state court was 'over the *legal and constitutional significance* of certain facts' and not over the facts themselves." *Sumner v. Mata,* 455 U.S. 591, 596 (1982) (*Sumner* II), emphasis in original. This Court disagreed:

> . . . [T]he statute . . . require[s] the federal courts to face up to any disagreement as to the facts and to defer to the state court unless one of the factors lised in §2254(d) is found. Although the distinction between law and fact is not always easily drawn, we deal here with a statute that requires the federal courts to show a high measure of deference to the factfinding made by the state courts. To adopt the Court of Appeals' view would be to deprive this statutory command of its important significance.

Id. at 597-98. Again the court remanded the case for further proceedings. *Id.* at 598.

The case at bar presents a situation virtually identical to that in *Sumner v. Mata.* As in that case, ineffective assistance of counsel is a mixed question of fact and law. *Strickland v. Washington, supra* at 698. Moreover, there is sharp disagreement between the Missouri Court of Appeals and the Eighth Circuit Court of Appeals as to the characterization of defense counsel's performance.

The Missouri Court of Appeals found as follows:

> Counsel had the benefit of Jones' recorded testimony from the first trial. Jones' testimony on the cross-examination directly supported the State's theory of the case under the capital murder submission. In counsel's professional opinion the disadvantages of Jones' testimony outweighed the advantages. Appellant assented to this trial strategy and

> signed a statement[3] attesting to this fact. Counsel felt no need to individually interview Jones as any deviation in Jones' testimony from that given at the first trial would have been subject to impeachment . . . We agree with the [post-conviction] motion court that counsel's investigation of potential witness . . . Jones . . . was reasonable under the circumstances and constituted deliberate trial strategy, not a failure to investigate.

Chambers v. State, 745 S.W.2d at 721-22, (A-111-112). The Court of Appeals, without discussing the presumption of correctness in the majority opinion,[4] re-characterized counsel's performance:

> The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial.

Chambers v. Armontrout, supra, A-8.

Having re-characterized counsel's performance, the Court of Appeals proceeded to hold counsel ineffective for failing to interview Jones, failing to call Jones at trial, and failing to call Jones at sentencing. *Chambers v. Armontrout, supra,* A-2-3. The re-characterization virtually compelled the ineffectiveness determination.[5] By ignoring the fact that defense counsel had

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[3] The text of the statement appears in the Eighth Circuit opinion, *Chambers v. Armontrout, supra,* A-12 n. 8.

[4] Indeed, the opinion does not refer to the "clearly erroneous" standard by which the Court was obliged to review the district court's finding that counsel acted strategically. *Washington v. Strickland, supra* at 1257 n. 24.

[5] Indeed, the Court admitted as much:

> Hager's decision not to call Jones thus is only as reasonable as Hager's decision not to interview Jones. That decision amounted to ineffective assistance of counsel.

Chambers v. Armontrout, supra, A-13.

the benefit of the transcript of the previous trial and, on that basis, made a strategic decision not to call Jones, the Court in effect treated the situation as an original trial rather than a re-trial.

In doing so, however, the Court eliminated a crucial portion of the totality of the circumstances, in view of which courts must analyze ineffectiveness claims. *Strickland v. Washington, supra* at 688, 690. Obviously, a defense attorney in an original trial must interview witnesses and conduct discovery in order to ascertain the nature and strength of the State's case, as well as to establish possible defenses. *Kimmelman v. Morrison,* 477 U.S. 365, 387 (1986). The availability of the transcript from an earlier trial, which counsel studied prior to his decision not to call Jones, offered a "unique procedural posture" that "provided [defense counsel] with the 20/20 hindsight to know that [Jones' testimony] had little, if any, effect on the jurors' deliberations." *Bell v. Lynaugh,* 828 F.2d 1085, 1090 (5th Cir.), *cert. denied,* 108 S.Ct. 310 (1987). The Court of Appeals, in re-characterizing counsel's performance, omitted this crucial element. Its ineffectiveness analysis was therefore flawed.[6]

Petitioner submits that the re-characterization of counsel's performance constitutes a violation of the presumption of correctness, 28 U.S.C. §2254(d), and that the Court thereby exceeded its jurisidiction. *Sumner* I, *supra* at 547 n. 2. Accordingly, certiorari should be granted.

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[6] The Court's re-characterization of counsel's performance resulted in a failure to defer to counsel's reasonable strategy. *See Chambers v. Armontrout, supra,* A-14.

II.

AN ATTORNEY CANNOT BE FOUND TO HAVE RENDERED CONSTITUTIONALLY-DEFICIENT ASSISTANCE WHERE, FOLLOWING HIS APPOINTMENT FOR A RETRIAL AFTER REVERSAL, AND AFTER STUDYING THE TRANSCRIPT OF THE FIRST TRIAL, HE DECIDED NOT TO CALL AS A WITNESS AN INDIVIDUAL WHOSE TESTIMONY THE ATTORNEY BELIEVED WOULD, ON BALANCE, HELP ESTABLISH, RATHER THAN CHALLENGE, THE PROSECUTION'S CASE.

The standards for evaluating claims of ineffective assistance of counsel are by now commonplace:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.* at 689. The reviewing "court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." *Id.* at 690. "At the same time, the court should recognize that counsel is strongly presumed to have ren-

dered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.*[7]

As for the prejudice prong of the *Strickland* test,

> It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test . . . and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding.

Id. at 694.[8]

Under 28 U.S.C. §2254(d), state court findings of facts on this issue are presumed correct.[9] *Strickland, supra* at 698; *Couch v. Trickey,* 892 F.2d 1338, 1341 (8th Cir. 1989); *Laws v. Armontrout,* 863 F.2d 1377, 1386 (8th Cir. 1988) (en banc), *cert. denied,* ____ U.S. ____, 109 S.Ct. 1944, ____ L.Ed.2d ____ (1989). District court findings are governed by the "clearly erroneous" standard. *Strickland, supra* at 698; Fed.R.Civ.P. 52(a). The legal conclusions are subject to *de novo* review. *Couch v. Trickey, supra* at 1341.

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[7] The court in *Strickland* also warned that "availability of intrusive post-trial inquiry into attorney performance or of detailed guidelines for its evaluation encourage[s] the proliferation of ineffective challenges." *Strickland, supra* at 690. We are long past the warning stage. It is a rare petition indeed that does not contain several allegations of ineffective assistance.

[8] The Eighth Circuit Court of Appeals reiterated these standards in *Couch v. Trickey,* 892 F.2d 1338, 1342-43 (8th Cir. 1989) and *Laws v. Armontrout,* 863 F.2d 1377, 1386-87 (8th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1944 (1989).

[9] Credibility determinations are findings of fact and are presumed correct. *Marshall v. Lonberger,* 459 U.S. 422, 433-34 (1983).

Petitioner submits that the Eighth Circuit Court of Appeals misapplied these standards in several important respects. Consequently, certiorari should be granted.

First, the Court of Appeals implicitly adopted at least two *per se* rules governing counsel's performance in spite of this Court's warning against doing so. *See Strickland, supra* at 688-89. As discussed above, the Court of Appeals re-characterized counsel's decision, upon reading the transcript of the previous trial, not to call a certain witness as a failure to investigate. *Chambers v. Armontrout,* No. 88-2383 (8th Cir. July 5, 1990) (en banc), (A-8). In addition to constituting a violation of the presumption of correctness, 28 U.S.C. §2254(d), the re-characterization amounts to a *per se* rule that counsel upon retrial may not make strategic decisions based upon his or her reading of the transcript. Rather, in order to avoid being found ineffective,[10] counsel must expend scarce resources tracking down leads[11] in hope of finding and establishing the all-important affirmative defense, even though it may, on balance, serve to promote, rather than to challenge, the prosecution's case.

This leads to the second implicit *per se* rule. The Court's decision carries with it the assumption that where an affirmative defense arguably is available, even though it may be potentially harmful to the defendant's case, a decision to defend by holding the prosecution to its burden of proof is deficient. Petitioner submits that this Court rejected such a view of ineffectiveness in

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[10] Petitioner submits that the inevitable result of the Eighth Circuit's decision will be for counsel to cease functioning as a counsel for the defendant and to focus instead on protecting his or her own interests. *Strickland* was supposed to prevent such a shift in focus. *Strickland, supra* at 689-90.

[11] This becomes particularly problematic in cases where, as here, the defendant has sent counsel after false leads. *Chambers v. State,* 745 S.W.2d 718, 722[7] (Mo.App. 1987), (A-112).

United States v. Cronic, 466 U.S. 648, 656 n. 19 (1984). The Fifth Circuit Court of Appeals clearly recognized "simply putting the government to its proof" as a "plausible line of defense" in *Washington v. Strickland,* 693 F.2d 1243, 1252[9] (5th Cir. 1982), *rev'd,* 466 U.S. 668 (1984). Respect for counsel's independence makes a *per se* rule to the contrary unadvisable at best.

To the extent that the Court of Appeals has adopted new *per se* rules of law,[12] the decision also violates *Teague v. Lane,* 489 U.S. ____, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). In *Teague,* this Court held that federal courts in *habeas corpus* cases may not announce new rules of law and apply them retroactively unless they fall within one of two narrow exceptions. *Id.,* 109 S.Ct. at 1069-78. Unless this Court overturns *Strickland's* refusal to adopt *per se* guidelines for ineffectiveness claims, *Strickland, supra* at 688-89, the new rules cannot be applied retroactively.

Second, the Eighth Circuit substituted its own version of the facts in violation of the presumption of correctness, 28 U.S.C. §2254(d). The most obvious instance of this is the re-characterization of counsel's performance as discussed above. In addition, the Court evidently adopted a view of the facts stated by a dissenting judge on direct appeal.

In its conclusion, the Court of Appeals stated that "[a]t the time of the second trial, this case appeared to involve a barroom brawl or altercation." *Chambers v. Armontrout, supra,* A-18. On direct appeal, dissenting Missouri Supreme Court Judge Welliver wrote that "[t]his is an ordinary barroom altercation" and that he could not therefore impose the death penalty. *State v. Chambers,* 714 S.W.2d 527, 534 (Mo. banc 1986), Welliver, J., dissenting.

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[12] The test for a new rule is whether the outcome is subject to debate among reasonable minds. *Butler v. McKellar,* ____ U.S. ____, 110 S.Ct. 1212, 1217-18, ____ L.Ed.2d ____ (1990).

The majority opinion, in adopting this version of the facts, ignored the fact that the jury rejected it in the first trial, *see State v. Chambers,* 671 S.W.2d 781 (Mo. banc 1984), and that the Missouri Supreme Court rejected it after the second trial.[13] In effect, the Court of Appeals created a radical discontinuity between facts inside the bar and facts outside the bar. Such an approach violates the presumption of correctness.

Third, in addition to its re-characterization of counsel's performance, the Court of Appeals erred in applying the prejudice prong of the *Strickland* test:

> Had Jones testified, a self-defense instruction would have been submitted to the jury[14] and Hager would have been permitted to argue self-defense. The jury might have acquitted Chambers of capital murder, either by finding him guilty of a lesser charge[15] or by finding that he acted in self-defense.

Chambers v. Armontrout, supra, A-16-17. The first proposition was refuted in the previous trial where the jury, with the "benefit" of Jones' testimony, had the opportunity to convict

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[13] "There is simply no evidence in the record to support the conclusion that defendant was not the initial aggressor *or that he did not provoke the entire series of deadly events from the time he entered the bar. . . .*" *State v. Chambers,* 714 S.W.2d at 531, emphasis added.

[14] This is an unwarranted assumption in view of the difference in the evidence regarding the size of the victim and the discussion of the respondent's actions inside the bar. *State v. Chambers,* 714 S.W.2d at 530-31.

[15] The Court did not explain how a self-defense instruction would affect a lesser charge.

on a lesser charge, but refused to do so.[16] *State v. Chambers,* 671 S.W.2d at 782, (A-126). The second proposition is mere speculation and is insufficient under *Strickland.* As noted above, it assumes that a self-defense instruction would have been given. There is little room in the Missouri Supreme Court's opinion for such speculation. *State v. Chambers,* 714 S.W.2d at 530-31, (A-117-119). *Strickland* requires the defendant to show a reasonable *probability* that the result would have been different. *Strickland, supra* at 694. At best, the majority opinion demonstrates a *conceivable effect* upon the result.

Fourth, the majority decision fails to take into account the effect of Jones' testimony on the jury.[17] In his well-reasoned and thorough dissent, Circuit Judge John R. Gibson noted that "a professional evaluation of the testimony's trial impact involves considering it in the light the jury would consider it." *Chambers v. Armontrout, supra,* A-25, Gibson, J., dissenting. Further, Judge Gibson disagreed with the majority's determination that Jones' testimony could not be harmful to the defense because it was "cumulative":

> Jones was the only witness who saw the whole incident outside the bar. [Counsel], when evaluating the probable impact of Jones' testimony on the jury, could have reason-

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[16] The same instructions were submitted in the second trial. *See* Appendix at 133-45. Moreover, in view of the instructions given during the penalty phase, A-146-51, in which it was clear that the jury was not required to recommend the death penalty even if the aggravating circumstances outweighed the mitigating circumstances, A-151, Instr. 21, any suggestion of prejudice under *Strickland* is tenuous at best.

[17] This is particularly true of the relationship between Jones' testimony and that of a State's witness, Fred Ieppert. As Judge Gibson pointed out, Jones' testimony would have undercut the beneficial portion of Ieppert's testimony. *Chambers v. Armontrout, supra,* A-26, at 26, Gibson, J., dissenting.

> ably concluded that Jones' testimony would drive the damaging points home to the jury. That strategic decision is one that must be viewed from the testimony's impact on the jury, because we are here deciding how the jury's verdict would have been affected.

Id. at A-25-26.

Judge Gibson's view of *Strickland* is correct. "When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the *factfinder* would have had a reasonable doubt respecting guilt." *Strickland, supra* at 695, emphasis added. With all due respect, the Eighth Circuit Court of Appeals is not the factfinder at issue.

Fifth, the majority's substitution of facts and recharacterization of counsel's performance caused it to discount the fact that respondent signed a statement, a month before trial, assenting to the decision not to call Jones as a witness. *Chambers v. Armontrout, supra,* A-12 n. 8. According to the majority, "the statement indicates only that a defendant with an eighth grade education, relying on information provided by Hager, agreed with Hager's decision not to call Jones." A-13. The majority also wondered why the respondent allowed the victim to swing first.[18] A-15 n. 11.

The majority's view of the facts is incomplete. This respondent is no stranger to the criminal justice system. Indeed, he presented a virtually identical self-defense/ineffectiveness claim in connection with an earlier assault conviction.[19] *See*

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[18] The victim had been drinking. *State v. Chambers,* 714 S.W.2d at 529, (A-115-116).

[19] The conviction was affirmed on direct appeal. *State v. Chambers,* 550 S.W.2d 846 (Mo.App. 1977).

Chambers v. State, 592 S.W.2d 542 (Mo.App. 1979). Having lost that claim ultimately (*see Chambers v. State,* 623 S.W.2d 76 (Mo.App. 1981), the respondent was in a better position to see what might work the next time around.

Thus, in the case at bar, defense counsel wisely discussed the strategic decision with his client and obtained the latter's assent. What counsel did not consider, however, was the possibility that a federal court of appeals, several steps removed from the case, would substitute its own version of the facts and re-characterize counsel's performance.[20]

Finally, the majority decision placed the Court of Appeals squarely at odds with the United States Court of Appeals for the Fifth Circuit. In *Bell v. Lynaugh,* 828 F.2d 1085 (5th Cir.), *cert. denied,* ____ U.S. ____, 108 S.Ct. 310, ____ L.Ed.2d ____ (1987), as in the case at bar, defense counsel had the benefit of the record in a previous trial. *Id.* at 1090. Based upon that record, defense counsel decided not to introduce psychiatric evidence in the second trial. *Id.*

Defense counsel's actions in *Bell* are parallel to those of counsel in the instant case:

> [Defense counsel] familiarized himself with medical testimony offered by both the defense and the state during the 1974 trial prior to developing his trial strategy. The unique procedural posture provided [defense counsel] with 20/20 hindsight to know that such evidence had little, if any, effect on the juror's deliberations. He realized that the testimony of [two psychiatrists] was particularly damaging and genuinely feared that such evidence was admissible as rebuttal evidence if he placed appellant's mental state in issue.

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[20] Judge John R. Gibson was correct: the majority opinion is based upon hindsight. *Chambers v. Armontrout, supra,* A-18, slip op. at 17-18, Gibson, J., dissenting.

Id. Moreover, Bell's argument, rejected by the Fifth Circuit, was remarkably similar to that of the respondent in the case at bar:

> Appellant suggests that because the focus during the 1982 trial was on the penalty to be imposed and not on appellant's guilt, [defense counsel] was obligated to introduce psychiatric evidence because it was the only possible avenue of relief. We decline to force [defense counsel] or any other attorney to travel an avenue which they genuinely fear will lead only to trouble for their client.

Id. at 1090 n. 6.

Petitioner submits that the Eighth Circuit majority decision fails under *Strickland v. Washington, supra,* and the presumption of correctness, 28 U.S.C. §2254(d). "Catch-22" situations cannot support ineffective assistance of counsel claims where the attorney acts out of an awareness of the potential pitfalls and/or benefits of a particular course of action. Accordingly, petitioner respectfully requests this Court to grant certiorari.

CONCLUSION

Petitioner respectfully requests that the petition for writ of certiorari be granted and that the judgment of the United States Court of Appeals for the Eighth Circuit be reversed.

Respectfully submitted,

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90-425

No. 90-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BILL ARMONTROUT, Warden
Missouri State Penitentiary,
Petitioner,

vs.

JAMES W. CHAMBERS,
Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2383EM

James W. Chambers,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri

Appellee's motion to stay the mandate of this court is granted pending the filing of a petition for writ of certiorari with the United States Supreme Court.

The issuance of the mandate in this case shall be stayed to and including September 7, 1990. If within that time there is filed with the Clerk of this court a certificate of notification by the Clerk of the Supreme Court that a petition for writ of certiorari has been filed, this stay shall continue until final disposition of the case by that court.

August 7, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2383

James W. Chambers,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal From the United States District Court
for the Eastern District of Missouri.

Submitted: January 19, 1990

Filed: July 5, 1990

Before LAY, Chief Judge; FLOYD R. GIBSON, HEANEY, Senior Circuit Judges; MCMILLIAN, ARNOLD, JOHN R. GIBSON, FAGG, BOWMAN, WOLLMAN, MAGILL, and BEAM, Circuit Judges.

HEANEY, Senior Circuit Judge.

James Chambers appeals his conviction and sentence of death for the capital murder of Jerry Lee Oestricker. We reverse the conviction because Chambers received ineffective assistance of counsel when his counsel (1) failed to interview, (2) failed to call

at trial, and (3) failed to call at sentencing the only witness who would have testified that Chambers acted in self-defense.

I. BACKGROUND

In December 1982, Chambers was tried for the murder of Oestricker in the Circuit Court of Jefferson County, Missouri. At that trial, two eyewitnesses gave conflicting versions of the events surrounding the moment when Chambers shot and killed Oestricker outside a bar in Arnold, Missouri.

Fred Ieppert, the government's eyewitness, testified to the following: (1) Chambers and Oestricker engaged in a heated argument inside the bar; (2) both Chambers and Oestricker decided to take the argument outside; and (3) upon their exit, Ieppert moved from his chair to the door of the bar, taking a few seconds to do so. Ieppert testified that he could observe the following from the door: (1) Oestricker stood up with his hands in the air; (2) Chambers pointed a pistol at Oestricker and fired a single shot into Oestricker's chest; (3) Chambers pistol-whipped Oestricker several times after he fell to the ground; and (4) Chambers told the victim to "take that, tough guy," shouted an epithet into the bar, and ran away.

James Jones, the other eyewitness, had left the bar several minutes before the shooting but had to wait in his car in the bar's parking lot because his engine was flooded. He testified that he observed the following: (1) the smaller man (Chambers) left the bar first, walked about half the length of a truck, and stood facing the bar; (2) the bigger man (Oestricker) left the bar a moment later; (3) the two men argued; (4) Oestricker moved towards Chambers and struck Chambers in the face, knocking Chambers to the ground; (5) Chambers then stood up and shot Oestrickr, who was standing six feet away; (6) Oestricker fell back against the wall; (7) Chambers hit the victim with the gun several times, knocking the victim to the ground; (8) Chambers yelled into the bar, "Do any of you want any of this?" and to

the victim, "Lay there and die"; (9) Chambers ran nearby to a parked car that had its engine running; and (10) the car sped quickly away. In addition, Jones testified that Oestricker was six foot-one inch tall and weighed 240 pounds and that Chambers was five foot-nine inches tall and weighed 150 pounds. Jones was the only eyewitness to the events occuring just before the shooting.

Chambers' attorney requested that a self-defense instruction be submitted to the jury. The trial court refused. The jury found Chambers guilty of capital murder and sentenced him to death.

On appeal, the Missouri Supreme Court reversed the conviction. *State v. Chambers,* 671 S.W.2d 781 (Mo. 1984) (en banc) [*Chambers I*]. It held that there was sufficient evidence to justify an instruction on self-defense, pointing specifically to Jones' testimony that Oestricker struck Chambers in the face, knocking Chambers to the ground. *Id.* at 783. The court held that a jury could reasonably conclude that Oestricker was the initial aggressor and that Chambers shot Oestricker because Chambers feared great bodily harm. *Id.*[1]

---

[1] The Missouri Supreme Court stated:

> Although there was verbal exchange inside the tavern, the initial act of physical aggression occurred when Oestricker struck Chambers in the face. Consequently, a jury could reasonably conclude that Oestricker, not Chambers, was the initial aggressor.
>
> Chambers is small in stature—5'6" tall and weighing 150 pounds. Oestricker, on the other hand, was 6'4" and 250 pounds. something more than fear of size, however, is required to justify the use of deadly force in self-defense. Some affirmative action, gesture or communication by the person feared indicating the immediacy of the danger, the ability to avoid it and the necessity of using deadly force must also be present. *State v. Jackson,* [522 S.W.2d 317, 319 (Mo. App. 1975)]; *State v. Isom,* 660 S.W.2d 739 (Mo.App. 1983). In *State v. Hicks,*

Missouri retried Chambers in Jefferson County. His newly appointed counsel was Donald W. Hager, a public defender. Hager neither interviewed Jones nor called Jones to testify on behalf of Chambers. The state did not call Jones. With this exception, the second trial proceeded in much the same manner as the first with Fred Ieppert providing the bulk of the prosecution's case. At the conclusion of evidence, Hager requested a self-defense instruction. As with the earlier trial, the trial court refused to instruct the jury on self-defense and denied Chambers the right to argue self-defense in his closing argument. The second trial also resulted in a conviction for capital murder. At sentencing, Hager sat mute, waiving Chambers' right to present mitigating evidence and argue for leniency. The jury sentenced Chambers to death.

With the assistance of yet another attorney, Chambers again appealed to the Missouri Supreme Court. Over the strong dissent of two judges, the court affirmed the conviction and the death sentence. *State v. Chambers,* 714 S.W.2d 527 (Mo. 1986) (en banc) [*Chambers II*].

On November 12, 1986, Chambers filed a motion in the Circuit Court of Jefferson County under Missouri Rule 27.26 asserting that he received ineffective assistance of counsel at the second trial. A hearing on this motion was held on February 3, 1987. Several witnesses testified, including Jones. Jones

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> [438 S.W.2d 215 (Mo. 1969)], the victim was not only much larger than the defendant but was also the initial aggressor. This Court found that these factors created an appearance of necessity for defendant to use deadly force to protect himself against severe bodily harm. Certainly, appellant could have drawn the same conclusion here.

Chambers I, 671 S.W.2d at 783.

testified to the same version of events as he had at the first trial.[2] Jones also testified that neither Hager nor anyone else from the public defenders' office had contacted him since the first trial.

Hager also testified at the Rule 27.26 hearing. He testified that before the second trial he had read Jones' testimony from the first trial, but that neither he nor anyone else from the public defenders' office ever contacted Jones.[3] Hager testified that he considered much of Jones' testimony to be damaging. The damaging aspects, according to Hager, were that Chambers stepped outside first, stopped, turned, and waited for Oestricker, concealing a pistol against his leg; Chambers pistol-

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[2] Jones did attempt, however, to eliminate some apparent confusion created by his testimony at the first trial.

> Q: [Thomas Schlesinger, Chambers' counsel]: Please read from the first seven lines on Page 741 [of the transcript of the first trial].
>
> A: [James Jones]: "No. It was right here, putting it behind his body, kind of against his leg. Q. Was Oestricker between him and the door? A. Yeah. Q. So was the gun back here? Is that right? A. Yeah."
>
> Q: Okay. Now, it says here—or you just read that you testified it was kind of against his leg. Did you mean that it was hidden?
>
> A: No. I didn't mean that it was hidden.
>
> Q: Is the testimony that you gave here accurate?
>
> A: I would say. I could show anybody—I could show you where it was. You could make your own judgment on it. I would say its being hidden, my own personal opinion.

Chambers v. Missouri, No. CV186-4580-CC-J3, transcript at 67 (Mo. 23d Cir. Feb. 23, 1987).

[3] Hager did testify that an investigator from the public defenders' office contacted Jones' attorney. Nothing came of this conversation, and Hager's office did not make any attempt to follow up on this contact.

whipped Oestricker and shouted, "Lay there and die;" Oestricker was six feet away and not moving towards Chambers at the time of the shooting; and Chambers left the scene in a car that was facing the road with its engine running. On this basis, Hager testified that he did not interview Jones or call Jones at the second trial because he believed that the damaging aspects of Jones' testimony outweighed its mitigating value.

Chambers' Rule 27.26 motion was denied by the Circuit Court of Jefferson County. His appeal of that ruling was denied by the Missouri Court of Appeals, and his application for transfer to the Missouri Supreme Court was denied.

Chambers next filed a petition for a writ of habeas corpus in federal court. Chambers alleged, *inter alia,* that he was denied effective assistance of counsel at the second trial because Hager failed to interview Jones or to call him at that trial. The district court held that Hager's performance was constitutionally adequate. The court concluded that the decision not to interview or call Jones at trial was reasonable because of the potential damaging aspects of Jones' testimony, because Jones was not a credible witness, and because Chambers signed a pretrial statement in which he agreed with Hager's decision not to call Jones at trial. Accordingly, the district court denied Chambers' petition for habeas relief.

Chambers appealed the district court's decision to this Court. On appeal, he argues that he was denied effective assistance of counsel because Hager did not interview Jones and did not call Jones at trial. A panel of this Circuit agreed, reversing the district court. *Chambers v. Armontrout,* 885 F.2d 1318 (8th Cir. 1989). We granted the petition for rehearing en banc and vacated the panel decision. After rehearing the appeal en banc, we reaffirm the panel decision and reverse the district court's denial of habeas relief.

II. DISCUSSION

Under the standards for analyzing a claim of ineffective assistance of counsel enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), Chambers must show that Hager's performance was deficient and that it prejudiced Chambers' defense. *See id.* at 687. Counsel's performance is deficient when it is less competent than the assistance that should be provided by a reasonable attorney under the same circumstances. *Id.*

A. FAILURE TO INTERVIEW JONES

The decision to interview a potential witness is not a decision related to trial strategy. Rather, it is a decision related to adequate preparation for trial. Thus, Hager had "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Id.* at 691. Because Jones was never interviewed by Hager, the question before us is whether Hager's decision not to interview Jones was reasonable from counsel's perspective at the time that decision was made.

The facts of this case, confirmed by Hager's actions at trial and testimony at the Rule 27.26 hearing, indicate that there was only one defense upon which Chambers could rely: self-defense. That defense was the only realistic defense to the capital murder charge. Moreover, self-defense was a mitigating circumstance appropriate for the jury's consideration in determining whether Chambers should be sentenced to death. Thus, without Jones' testimony that Oestricker had knocked Hager to the ground, Hager was not permitted to argue self-defense as either a partial or complete defense to capital murder. Without Jones' testimony, the jury could only return a verdict that Chambers was guilty of capital murder.

Because of the grave effect of Hager's decision not to interview Jones in this capital murder case, Chambers alleges that Hager's decision was unreasonable. He asserts that an interview

with Jones would have (1) clarified many of the problems Hager saw in Jones' testimony at the first trial, (2) permitted Hager to make his own assessment of Jones' demeanor and credibility, (3) permitted Hager to ascertain whether Jones would adhere to his testimony at the first trial, *see supra* note 2, (4) enabled Hager to discover additional evidence favorable to Chambers, and (5) enabled Hager to be more effective in his cross-examination of witnesses put forward by the government.[4]

To determine the reasonableness of Hager's decision not to interview Jones, a review of the underlying circumstances as known to Hager at the time of second trial is in order. Chambers never contended that he did not shoot Oestricker. Chambers never contended that he and Oestricker did not argue with each other in the bar. Chambers never contended that he and Oestricker did not challenge each other to a fight.

Chambers did contend at both trials that the government's theory that the fight was a ruse to lure Oestricker outside where Chambers could murder him was fiction and not fact. He contended that the shooting grew out of a barroom altercation and that he acted in self-defense after he had been knocked to the ground by Oestricker. Because Chambers' apparent strategy did not change from the first trial to the second trial and because no indication of new or different testimony existed, reasonable counsel would have anticipated that Chambers' second trial would proceed much as the first trial did. Except for the lack of testimony tending to show that Oestricker knocked Chambers to the ground just before Chambers shot him, the second trial did proceed much as the first did. The second trial therefore lacked the very testimony that the Missouri Supreme Court stated justified a self-defense instruction in the first trial.

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[4] Although the State does not suggest that Jones was unavailable, Chambers notes that Hager had at his disposal the address and phone number of Jones and a paid investigator who was available to locate, interview, and subpoena Jones.

Missouri argues, however, that Hager's decision not to interview Jones was reasonable in light of the damaging aspects of Jones' testimony. We disagree. Other witnesses had testified to the negative aspects of Jones' testimony cited by Hager as justifying his decision not to interview Jones.[3] In that respect, any

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[3] The State notes that Jones testified in the first trial that Chambers left the bar first and waited for Oestricker. Numerous witnesses testified to this fact at both trials. Second, Jones' testimony at the first trial could be read to imply that Chambers, as he left the bar, intentionally hid his pistol from Oestricker's view. A state witness testified to the same fact at both trials. *Missouri v. Chambers,* No. 64709, Transcript at 505-07 [*Chambers I,* T.] (tesimony of James Fowler, a bar patron); *see Missouri v. Chambers,* No. 67191, Transcript at 586-88 [*Chambers II,* T.]; *see also Chambers I,* T. at 466 (testimony of Fred Ieppert and several other witnesses that Chambers was hiding some knife or weapon). An interview with Jones would have clarified that he never intended to give such an impression. *See supra* note 2. Third, Jones testified that Chambers pistol-whipped Oestricker. Several of the State's witnesses also testified that Chambers pistol-whipped Oestricker. *Chambers I,* T. at 465, 508, 556, 645, 654, 689; *see Chambers II,* T. at 374-77, 420, 458, 501, 524, 540-41, 590. Fourth, Jones testified that at the time he was shot, Oestricker was standing six feet away from Chambers. Fred Ieppert testified to the same fact. *Chambers I,* T. at 464; *see Chambers II,* T. at 447 (Fred Ieppert testified that the distance separating the two was five feet). Fifth, Hager indicated that he considered Jones' testimony that Chambers shouted several epithets at Oestricker and the other bar patrons after the shooting to be damaging. Numerous witnesses repeatedly testified to this fact. *Chambers I,* T. at 466, 509, 542, 566, 680, 700; *see Chambers II,* T. at 330, 360, 375, 420-21, 508, 591. The final aspect that Hager considered damaging related to Jones' testimony that after the shooting, Chambers ran to a waiting car with its motor running which immediately sped off.

The dissent asserts that the "most damning evidence of cool planning was Jones' testimony that the car was left running." This may indeed be the case, but another witness, Dennis Simmons, testified that Chambers had a car "waiting." *Chambers I,* T. at 656-57; *see Chambers II* at 460-61. This evidence of premeditation therefore was before the jury, but without Jones' further testimony that Oestricker, a much larger man, knocked Chambers to the ground before the shooting occurred—evidence which was essential to the self-defense theory and tended to show that the shooting may not have been premeditated was not presented to the jury.

damaging testimony that Jones gave at the first trial was cumulative, and reasonable counsel would have interviewed Jones to make sure that Jones was willing to repeat his earlier testimony that Oestricker knocked Chambers to the ground, to satisfy himself as to the remainder of Jones' testimony, and to assess Jones' credibility.

The State also argues that Hager's decision not to interview Jones was reasonable because Hager had reasonably determined that Jones lacked credibility. We do not agree: (1) the Missouri Supreme Court based its decision in *Chambers I* to remand for a new trial on Jones' testimony; (2) the government made no attempt to impeach Jones' credibility at the first trial; (3) Hager never met Jones nor spoke with him on the telephone enabling Hager to form a personal impression of Jones; and (4) the transcript of Jones' testimony at the first trial discloses no basis upon which reasonable counsel would have concluded that Jones was not a credible witness.[7]

The State argues that further investigation of Jones was unnecessary because Chambers did not intend to use the theory of self-defense at trial. This argument is not supported by the facts of the case. Hager's defense of Chambers proceeded on a self-defense theory. His questions on cross-examination were focused solely on the issue of self-defense. Hager requested and was denied a self-defense instruction. The trial court also did not permit Hager to argue self-defense to the jury. Most importantly, the self-defense theory, as either a total or partial defense to capital murder or a mitigating circumstance at the sentencing phase, was Chambers' only possible, indeed, his only reasonable, defense to the death penalty. *See also Code v.*

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[7] Assuming that Hager's determination that Jones lacked credibility was reasonable, we doubt that that determination, under these facts, would justify reasonable counsel's decision not to interview the only witness who had the only evidence supporting an essential element of the defendant's only defense.

Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to investigate sole defense established ineffectiveness) and cases cited therein.

The State's final contention is that Chambers gave Hager reason to believe that further investigation of Jones would be fruitless or even harmful.[4] In support of this contention, the State relies on language in *Strickland*.

Strickland, however, is inapposite. The Supreme Court in *Strickland* stated that

> [c]ounsel's actions are usually based quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information. For example, when the facts that support a certain potential line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Strickland, 466 U.S. at 694. Chambers' statement did not give Hager reason to believe that pursuing certain investigations

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[4] The State's argument is that Hager's decision not to interview Jones is reasonable for the very reason that Chambers agreed with the decision in a signed statement. Chambers' signed statement is as follows:

> I agree that Mr. Hager need not subpoena or call James Jones at my trial. His cross examination at the first trial was extremely damaging to me and I believe it would be at the second trial. I have been admonished that by not calling James Jones it may not be possible to obtain a jury instruction on self defense.
>
> 4/13/85 /s/ James W. Chambers

would be fruitless or harmful. It does not provide Hager with any information that either discredited Jones or Jones' testimony. Rather, the statement indicates only that a defendant with an eighth grade education, relying on information provided by Hager, agreed with Hager's decision not to call Jones. Whether or not Chambers agreed with the decision not to call Jones does not make that decision any more reasonable or the investigation fruitless or harmful.

Accordingly, we conclude that reasonable counsel would have interviewed Jones. The probativeness of Jones' testimony regarding self-defense weighs heavily in this determination. He was the only person to see the entire altercation outside the bar.[9] As such, his testimony regarding Oestricker knocking Chambers down was uncontradicted. Because reasonable counsel would have interviewed Jones, Hager's decision not to do so constituted ineffective assistance.

B. FAILURE TO CALL JONES AT TRIAL

Our analysis of Hager's decision not to call Jones as a witness parallels our analysis of Hager's decision not to interview Jones. "[S]trategic choices made after less than complete investigation are reasonable precisely as to the extent that reasonable professional judgment supports the limitations on investigation." *Strickland,* 466 U.S. at 690-91. Hager's decision not to call Jones thus is only as reasonable as Hager's decision not to interview Jones. That decision amounted to ineffective assistance of counsel. *See* Part (II)(A).

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[9] As noted above, a gap of several seconds exists in the testimony of the government's eyewitness, Fred Ieppert. Jones had a clear view of the area outside the bar from his car. This is confirmed by the fact that the State neither cross-examined as to Jones' view of the incident nor argues on appeal that Jones was unable to see the entire incident clearly. Jones' unquestioned clear view of the incident simply emphasizes the importance of an interview with Jones.

Furthermore, because the deference generally granted to strategic choices of trial counsel is not required due to Hager's lack of preparation, the decision not to call Jones at trial was itself unreasonable in light of all the circumstances as they appeared at the time of the second trial.

By failing to call Jones, Hager attempted to use a defense that lacked evidentiary support.[10] By failing to call Jones, Hager neglected the law of the case. *See Chambers I,* 671 S.W.2d at 783 (something more than the barroom argument and the differences in physical size—something indicating the immediacy of danger—had to be present). By failing to call Jones, Hager ignored an unbiased, uncontradicted witness who provided evidentiary support to Chambers' only defense and whose damaging testimony was merely cumulative of several of the State's witnesses' testimony. By failing to call Jones, Hager disregarded a witness whose testimony would have directly contradicted the State's theory that Chambers' barroom altercation with Oestricker was a ruse on Chambers' part to lure Oestricker

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[10] Hager attempted to elicit sufficient evidence of self-defense through cross-examination of the State's witnesses. The alleged evidence that supported Hager's theory at the second trial was that Oestricker had a pair of pliers in his hand when he was shot. Hager questioned several of the State's witnesses about the pliers. Only one of the witnesses, Fred Ieppert, knew any information about any pliers, and Ieppert testified that he had dropped a pair of pliers when he reached in his pants pocket to pull out a handkerchief on seeing Oestricker's dead body.

Our review of the record indicates that at the time of the second trial, Hager had no reasonable basis to conclude that he would be able to elicit sufficient evidence of self-defense through cross-examination. As a matter of fact, Hager was unable to elicit sufficient evidence. Furthermore, Hager never interviewed any of the witnesses, including Ieppert, as to Oestricker's possession of pliers.

outside where Chambers could murder him.[11] By failing to call Jones, Hager slighted testimony amounting to a mitigating circumstance at the subsequent sentencing hearing.

In sum, Hager's decision not to call Jones resulted in Chambers admitting that he had shot and killed Oestricker without any explanation that would support a verdict of less than capital murder and sentence of less than death. The State has not offered sufficient reason to support a conclusion that Hager's decision not to call Jones was reasonable.[12]

C. PREJUDICE

Under *Strickland,* the question remains whether, in light of all the circumstances, Hager's ineffective assistance of counsel resulted in any prejudice. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors," the "result would have been different." *Strickland,* 466

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[11] The probative value of Jones' testimony on this point is striking. If the barroom altercation was merely a ruse, as the State suggested, to provide sufficient evidence of Chambers' intent to support a capital murder instruction, then why did Chambers—according to Jones' testimony—wait until Oestricker hit him in the face, knocking him to the ground, before he shot him?

[12] Judge Blackmar of the Missouri Supreme Court noted this point in his concurring opinion in *Chambers II.*

> There is a mystery as to why the evidence that the victim struck the defendant, knocking him to the ground, which was held to require a self-defense instruction in the first trial, was not offered in the second.

Chambers II, 714 S.W.2d at 534 (Blackmar, J., concurring). In dissenting from a holding that there was insufficient evidence at the second trial to justify submission of a self-defense instruction, Judge Welliver of the Missouri Supreme Court stated, "The principal opinion, I fear, becomes the best evidence for proof of a charge of ineffective counsel." *Id.* (Welliver, J., dissenting).

U.S. at 694-95; *Sanders v. Trickey,* 875 F.2d 205, 208 (8th Cir. 1989). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 477 U.S. at 694. In this instance, prejudice occurred if Hager's deficient "conduct so prejudiced [Chambers] as to undermine confidence in the outcome of the trial" or sentencing. *Byrd v. Armontrout,* 880 F.2d 1, 4 (8th Cir. 1989).

The result of Hager's ineffective assistance to Chambers was that Jones did not testify in Chambers' behalf at trial or sentencing. Jones' testimony had great potential to aid Chambers' case. Jones was a disinterested witness who testified that Oestricker hit Chambers hard enough to knock Chambers to the ground before the fatal shot was fired. Because no one else saw what occurred outside the bar the first few moments after Oestricker exited the bar, Jones' testimony would have been given to the jury without contradiction. With Jones' testimony, the court would have instructed the jury on self-defense and permitted Hager to argue self-defense. Our review of the record indicates that only Jones' testimony substantially supported either approach.[13] The prejudice is plain.

We cannot say what would have happened at the second trial had Jones testified, but we are not confident in its verdict. Had Jones testified, a self-defense instruction would have been submitted to the jury and Hager would have been permitted to argue self-defense. The jury might have acquitted Chambers of

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[13] Even without Jones' testimony, Hager asserted that Chambers acted in self-defense or with legal provocation. Hager presented insufficient evidence, however, either to support an instruction on self-defense or to permit Hager to argue self-defense to the jury.

capital murder, either by finding him guilty of a lesser charge[14] or by finding that he acted in self-defense.[15] In addition, if the jury had credited Jones' testimony at sentencing, it might not have sentenced Chambers to death.[16]

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[14] The State contends that the reasonable probability of being found guilty of a lesser charge does not amount to prejudice. We cannot agree. *See Strickland,* 466 U.S. at 695 (prejudice is the "likelihood of a result more favorable to the defendant"). The State's interpretation of *Strickland* ignores the facts of that case. The Supreme Court explicitly recognized that prejudice can occur in sentencing alone. *Id.* Therefore, if the possibility of a shorter sentence constitutes prejudice, then the possibility of a conviction of a lesser charge resulting in a shorter sentence also constitutes prejudice.

[15] Missouri argues that Chambers cannot make an adequate showing of prejudice because the other evidence against him was sufficiently impressive that his failure to call Jones was not likely to alter the outcome of the case. We disagree. *See Chambers I,* 671 S.W.2d at 784 ("While the evidence of self-defense is not so unequivocal as to mandate a directed verdict of acquittal, the evidence is sufficient to justify submission of self-defense to the jury."). Assuming, however, that Jones' testimony is not likely to be outcome determinative, we would still find sufficient prejudice under the Constitution. In adopting the prejudice prong of *Strickland,* the Supreme Court stated that it believes "that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland,* 466 U.S. at 693. The Constitution merely requires "a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

[16] Chambers also makes two other claims: Hager's decision not to interview or call as witnesses Donald Chapman, Eleanor Hotchkiss, and Jackie Turner denied Chambers effective assistance of counsel; and Chambers was denied a fair trial because the trial court failed to submit a self-defense instruction to the jury. As to the former issue, we have carefully examined the record and find that claim to be without merit. As to the latter issue, the trial court was correct not to submit the self-defense instruction to the jury because absent Jones' testimony, insufficient evidence existed to support the theory that Chambers acted in self-defense.

III. CONCLUSION

At the time of the second trial, this case appeared to involve a barroom brawl or altercation. Chambers did not, and could not, deny shooting Oestricker. His only defense to the charge of capital murder and the death penalty was that he acted in self-defense. Only one witness could testify to one of the required elements of self-defense permitting either submission of the issue or argument to the jury. That witness' harmful testimony would have appeared to reasonable counsel at the time of the second trial to be cumulative rather than significantly damaging. That witness appeared credible. That witness appeared crucial to Chambers' only defense. Chambers' counsel nonetheless failed to interview or call this witness to the stand, although he knew of his existence, knew of his testimony, and was able to contact him. On these facts, we hold that Chambers received ineffective assistance of counsel and was prejudiced thereby.

Therefore, we reverse and remand to the district court with directions that it enter an order that the state either retry Chambers within 120 days of this order or free him from custody. The district court shall further order that the state notify this court and the district court of its intention in this regard within 45 days of this order.

JOHN R. GIBSON, Circuit Judge, dissenting, with whom FAGG, BOWMAN, MAGILL, and BEAM, Circuit Judges, join.

I respectfully dissent.

The court today ignores the Supreme Court's instruction that in reviewing the performance of Chambers' lawyer, Hager, "every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Strickland v. Washington,* 466 U.S. 668, 689 (1984). Like the district court and the state trial court that

reviewed this claim, I conclude that Hager properly made a strategic judgment that Jones should not be called to testify and need not be interviewed because Jones' testimony would have been more harmful than helpful to Chambers. Furthermore, after studying Jones' testimony during the first trial, I believe that neither element of the *Strickland* test has been satisfied, and I would affirm the district court judgment denying the writ.

Although the decision of the Missouri Supreme Court, reviewing the direct appeal from Chambers' first trial, clearly states that Jones' testimony would have supported a self-defense instruction,[1] Jones was not called to testify at the second trial. However, the state trial court, in considering the collateral attack under Missouri's Rule 27.26, concluded that Jones' testimony, on balance, was more damaging than helpful to Chambers. After observing that Hager "could cho[o]se between a weak self-defense theory that carried with it a strengthening of the State's case," or try the case as he did, the state court concluded that the decision to not call Jones was a

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[1] The Missouri Supreme Court, in reversing the *Chambers I* judgment, observed that there was conflicting evidence as to the incident and stated that "[i]n examining the record for evidence of self-defense, we must consider the evidence in [the] light most favorable to appellant Chambers." *State v. Chambers,* 671 S.W.2d 781, 783 (Mo. 1984) (en banc). After reviewing the evidence in that manner, the court concluded that "[w]hile the evidence of self-defense is not so unequivocal as to mandate a directed verdict of acquittal, the evidence is sufficient to justify submission of self-defense to the jury." *Id.* at 784.

reasonable one.[2] The Missouri Court of Appeals affirmed the conviction, *Chambers v. State,* 745 S.W.2d 718 (Mo. Ct. App. 1987), and Chambers' application for transfer to the Missouri Supreme Court was denied.

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[2] The detailed reasoning of the state trial judge is as follows:

> During this proceeding, Donald Hager testified that the decision not to call Jones was [a] deliberate one, based upon strategic concerns. That, having the benefit of Jones' testimony on cross-examination adduced at the first trial, in his professional opinion, the disadvantages of Jones' testimony outweighed the advantages. The State's cross-examination . . . was highly damaging in that it supported the State's theory of the case under a capital murder submission. Mr. Hager knew that although Jones' testimony would have supported a self-defense instruction, it corroborated the State's main witness—Fred Ieppert—and conflicted with his defense strategy. His strategy at trial was to: 1) attack the credibility of the State's witnesses; 2) suggest that Oestricker had a pair of pliers in his hands; and 3) attempt to negate the element of Chambers reflecting "cooly" upon . . . taking the life of Oestricker. The fact that Jones was in a position to observe the condition of the getaway car with running engine and the distance between the victim and petitioner at the time of the fatal shot would have made this trial strategy almost impossible from a practical standpoint.
>
> * * * * * *
>
> Without Jones' testimony a jury might believe, as at least one [Missouri] Supreme Court Judge did, that the whole matter was just "an ordinary barroom altercation" thus negating the cool reflection that might not exist under those circumstances.
>
> * * * * * *
>
> In light of the foregoing, the Court finds that petitioner's trial counsel's decision not to call Jim Jones was a reasonable one based on his professional judgment in consideration of the evidence and the circumstances in the first trial.

Chambers v. Missouri, No. CV186-4580-CC-J3, slip op. at 12-13 (23d Cir. Ct. March 11, 1987). The court also rejected Chambers' claim that he had not read the signed statement in which he agreed with the decision to not call Jones. *Id.* at 14 n.2.

The district court, in this habeas corpus action, concluded that Jones' testimony would have supported the State's theory of the case. It also concluded that, because Hager's failure to interview Jones resulted from a strategic decision, his performance was not deficient. Because it decided that Hager rendered effective assistance, the district court did not reach the question of prejudice.[3]

I.

The effectiveness component of the *Strickland* test asks whether the defendant received "reasonably effective assistance." 466 U.S. at 687. Moreover, *Strickland* teaches us that judicial scrutiny of counsel's performance must be "highly deferential," *id.* at 689, and should eliminate the "distorting effects of hindsight," *id.*

In performing the first part of the *Strickland* analysis, courts distinguish between actions that result from inadequate pretrial preparation and those that are the product of trial strategy decisions. *See Burger v. Kemp,* 483 U.S. 776, 788-95 (1987); *Kimmelman v. Morison,* 477 U.S. 365, 384-87 (1986); *Darden v.*

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[3] The district court's reasoning is of interest:

> The Court finds reasonable counsel's conclusion that Jones' testimony would have tended to support the state's theory of the case and thus his decision not to call Jones as a witness. This is especially true in view of petitioner's written and signed pretrial statement that he agreed with counsel's decision in this regard. As the United States Supreme Court noted, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the petitioner's own statements or actions." *Strickland, supra,* 466 U.S. at 691. Furthermore, counsel reasonably assessed the affect [sic] of Jones' earlier testimony on both the state's theory of the case and Jones' credibility as a witness.

Chambers v. Armontrout, No. 88-0567C(3), slip op. at 12 (E.D. Mo. July 19, 1988).

Wainwright, 477 U.S. 168, 184-87 (1986); *Strickland,* 466 U.S. at 687-91; *United States v. Gray,* 878 F.2d 702, 711 (3d Cir. 1989); *Laws v. Armontrout,* 863 F.2d 1377, 1382-86 (8th Cir. 1988) (en banc), *cert. denied,* 109 S.Ct. 1944, *reh'g denied,* 109 S.Ct. 3179 (1989). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691. As the Third Circuit recently stated, "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *Gray,* 878 F.2d at 711.

In contrast to the close scrutiny which courts give to an attorney's preparatory activities, greater deference is given to an attorney's informed strategic choices. Indeed, it has been clear since *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690. Also, in reviewing the performance of counsel, "courts must resist the temptation to second-guess a lawyer's trial strategy." *Laws,* 863 F.2d at 1393 (quoting *Blackmon v. White,* 825 F.2d 1263, 1265 (8th Cir. 1987)), because even a losing strategy "may have been reasonable in the face of an unfavorable case." *Id.* at 1394 (emphasis removed) (quoting *Blackmon,* 825 F.2d at 1265).

Chambers attempts to formulate arguments based upon Hager's allegedly inadequate investigation. However, as the Seventh Circuit has observed:

> When the allegation of the ineffectiveness of counsel centers on a supposed failure to investigate, we cannot see how, especially in the context of a habeas proceeding that

> collaterally attacks the state court conviction, the petitioner's obligation can be met without a comprehensive showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.

United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1016 (7th Cir. 1987).

Hager, trial counsel in Chamber's second trial, read the transcript of Jones' testimony in the first trial and concluded that the testimony was more damaging than helpful. While the court today states that Hager's decision to not interview Jones reflects inadequate preparation for trial rather than a conscious trial strategy, that conclusion ignores the fact that Hager carefully studied and analyzed Jones' testimony from the first trial and knew that any departures from it would open up a strong credibility attack. His decision to not interview Jones does not demonstrate inadequate preparation for trial, but rather a careful analysis of known testimony. The only reason for Hager to have interviewed Jones would have been to see if Jones would change his story. Hager decided not to interview Jones because even any substantial, beneficial changes in his story would have created an excessive danger of devastating impeachment. *Chambers v. State,* 745 S.W.2d at 720. Furthermore, as is clear from Jones' testimony at the 27.26 hearing, the only new information that an interview would have produced was Jones' rather lame explanation that when he said that Chambers had held the gun "back here" and against his leg, he did not mean that it was hidden. *See ante* at 4-5 n.2, 9 n.7. Such an embellishment is precisely the sort of a change that could have led to damaging cross-examination of Jones, particularly because Jones had explicitly stated at the first trial that Chambers was not displaying the weapon. (*Chambers I* Tr. at 740-41).

My study of the record convinces me that both the state trial court and the district court properly assessed Jones' testimony. At the first trial, Jones testified that Chambers arrived in a car which was turned to face the exit from a bar's parking lot. (*Chambers I* Tr. at 748). As Chambers entered the building, the car was left running and was still occupied by the driver. (*Id.* at 748-49). Jones testified that he saw Chambers come out the door, get about half the distance of an automobile or truck, and turn half-way toward the door. (*Id.* at 738). Oestricker followed Chambers out of the door and struck Chambers hard enough to knock him down. (*Id.*). Chambers then got up, took a step forward, and shot Oestricker. (*Id.*).

However, on cross-examination, Jones revealed that when Chambers walked out the door and turned around half-way, he already had a pistol in his hands, (*Id.* at 740), with the gun against his leg and positioned behind him, (*Id.* at 741). Oestricker was just emerging through the door when Chambers stopped, turned around with the gun in hand, and waited for Oestricker to come out. (*Id.* at 741-42). Jones also testified that he had not seen Oestricker attempt to strike Chambers before Chambers initially took the gun out. (*Id.* at 742). According to Jones, after Chambers shot Oestricker, Chambers said either "[t]ake that, tough guy," or "[t]ake that." (*Id.*). After being shot, Oestricker made a grunting sound and backed up three or four steps. (*Id.*). Chambers then walked toward him and slapped him in the head with the pistol "[o]ver and over and over again." (*Id.* at 742-43). Furthermore, Oestricker was standing about six feet away from Chambers at the time of the shot and was not moving toward Chambers. (*Id.* at 747). Jones also said that, after shooting Oestricker, Chambers walked into the building and asked "if anybody else wanted any of this." (*Id.* at 746). As he left the building, Chambers said to Oestricker, "Lay there and die." (*Id.* at 747).

Based upon this testimony, I cannot conclude that Hager acted in an unreasonably ineffective manner by deciding to not

call Jones. Even if Jones' testimony supported a self-defense instruciton, as the Supreme Court of Missouri held, the testimony also indicated that Chambers, with a pistol concealed against his leg, both waited for Oestricker to come out of the door and, after being struck, fired the fatal shot while Oestricker was six feet away and was not moving toward him. After threatening the crowd in the bar, Chambers ran to the car which had waited for him, with its motor running, during the entire incident.

While the question of whether there was enough evidence to support a self-defense instruction involves considering the evidence in the light most favorable to Chambers, a professional evaluation of the testimony's trial impact involves considering it in the light that the jury would consider it. This is a far broader analysis, and I cannot conclude that Hager was unreasonably ineffective in his assessment of the impact of Jones' testimony on the jury. The Supreme Court has refused to find ineffective assistance where a lawyer did not introduce helpful evidence which, in turn, could have led to the introduction of other more harmful testimony. *See Burger,* 483 U.S. at 788-95; *Darden,* 477 U.S. at 184-87. The testimony by Jones presented just such a dilemma for Hager, and we should follow the teaching of the Supreme Court by refusing to hold that there was ineffective assistance in this respect.

The court today has only one answer to the damaging aspects of Jones' testimony: it states that "any damaging testimony that Jones gave at the first trial was cumulative." *Ante* at 9. An appellate court often categorizes testimony as cumulative in deciding evidence questions, but this is no answer at all in the context of evaluating Hager's decision. While the court establishes conclusively that testimony by James Fowler, Fred Ieppert, Dennis Simmons and several other witnesses overlapped with testimony by Jones, *ante* at 9 n.7, it fails to establish that Jones' testimony would have had only a negligible impact on the jury, thus underscoring the wisdom of Hager's decision to not call Jones to testify. Jones was the only witness who saw

the whole incident outside the bar. Hager, when evaluating the probable impact of Jones' testimony on the jury, could have reasonably concluded that Jones' testimony would drive the damaging points home to the jury. That strategic decision is one that must be viewed from the testimony's impact on the jury, because we are here deciding how the jury's verdict would have been affected. An appellate court engages in a far different exercise when it concludes that evidence is cumulative in deciding whether evidence either should have been admitted or excluded, or whether error was harmless or prejudicial. It was the jury impact, however, that Hager analyzed.

Moreover, the court's assertion that all of Jones' harmful testimony was already before the jury in the second trial[4] is patently incorrect. Had Jones testified at the second trial, he would have introduced an important piece of information that would have helped establish an element of capital murder, and he would have hurt Chambers by directly contradicting the testimony of another witness.

At the first trial, Jones testified Chambers arrived in a car that made a U-turn to face the street, that someone stayed in the car while Chambers went inside, that Chambers was inside the bar for only two or three minutes, *and that the car's engine was left running during the entire episode.* (*Chambers I* Tr. at 748-49). At the second trial, the jury was instructed that it could convict Chambers of capital murder only if it found that he "considered taking the life of Jerry Lee Oestricker and reflected upon this matter coolly and fully before doing so." (*Chambers II* Tr. at 681). The most damning evidence of cool planning was Jones' testimony that the car was left running, because that testimony undercuts Chambers' theory that he in-

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[4] Although the court today relies upon testimony from both trials, it does not explain why testimony at the first trial, by witnesses other than Jones, is relevant to the question of whether Jones should have been called at the second trial.

nocently went into the bar to drink with Oestricker, but it squarely supports the State's theory that Chambers planned the shooting even before entering the bar. Because Jones was not called at the second trial, the jury at that trial was unaware of this damaging information.

Jones also would have hurt Chambers by directly contradicting the testimony of Fred Ieppert, the only witness besides Jones who testified concerning the events that immediately preceded the shooting. At the first trial, both Jones and Ieppert testified that Chambers shot Oestricker while Oestricker was standing still, approximately six feet away from Chambers. (*Chambers I* Tr. at 464, 746-47, 750-51). After Hager confronted Ieppert with statements that Ieppert had made at a pre-trial hearing, however, *Ieppert testified at the second trial that Oestricker was moving toward Chambers when the shot was fired.* (*Chambers II* Tr. at 446, 451). Ieppert's testimony at the second trial helps support a self-defense theory. Had Jones testified at the second trial, he would have directly contradicted Ieppert. Thus, it is difficult to understand how the court can call this part of Jones' testimony "cumulative."

It is also important to consider the fact that, before the second trial, Chambers signed a statement in which he agreed with the decision to not call Jones. The Supreme Court stated in *Strickland* that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," 466 U.S. at 691, and that those statements are critical to a proper assessment of litigation decisions, *id.* When Chambers' signed statement is considered in combination with the content of Jones' testimony at the first trial, I am convinced that the decision to not call Jones was reasonable under *Strickland.*

The court, purporting to answer arguments made by the State, engages in a substantial discussion of Jones' credibility.[5] The court's affirmation of Jones' credibility hardly supports its position today, however, because Jones' believable testimony simply hammered home the State's case.

The court views Hager's actions in a myopic sense when it concludes that Jones was not called as a witness because he was not interviewed. Hager had the full benefit of the trial transcript of Jones' earlier testimony and made a careful strategic determination that the testimony was more harmful than helpful and that any changes in the testimony would open Jones up for vigorous cross-examination that would hurt Chambers. We should not second-guess that decision or place it in a light contrary to that required by *Strickland.*

In holding that Hager's assistance was unreasonably ineffective, the court today reaches a result contrary to that reached in earlier decisions in which we recognized that *Strickland* is not violated when a counsel, in the exercise of professional judgment, decides not to produce mitigating evidence that could reasonably be considered more damaging than helpful. In *Smith v. Armontrout,* 888 F.2d 530 (8th Cir. 1989), we held that certain medical records would have hurt the defendant at least as much as they helped, and we refused to flyspeck the decision of a lawyer long after the fact. *Id.* at 534-35. Similarly, in *Swindler v. Lockhart,* 885 F.2d 1342 (8th Cir. 1989), *cert. denied,* 110 S. Ct. 1938 (1990), we held that it was not unreasonable for counsel to refrain from offering into evidence medical reports, concerning the defendant's mental condition, that he felt to be more damaging than helpful. *Id.* at 1352-53. *See also Laws,* 863 F.2d at 1387-91.

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[5] The statement that the Missouri Supreme Court found Jones' testimony credible is simply not based upon its opinion. *See ante* at 19 n.1. The fact that the State did not attempt to impeach Jones' credibility is completely understandable in light of the support that Jones gave to the State's version of the case.

II.

Even if Hager should have called Jones, the *Strickland* test is not satisfied unless Chambers can also demonstrate "that the deficient performance prejudiced the defense." *Strickland,* 466 U.S. at 687. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is defined as one which is "sufficient to undermine confidence in the outcome." *Id.* After a thorough examination of the record, I conclude that there is not a reasonable probability that the introduction of Jones' testimony would have changed the outcome of the second trial.[6]

Accordingly, I would affirm the judgment of the district court denying the writ.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

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[6] We need not discuss in detail the statement and assumption made by the court today that the two trials were essentially the same except for the fact that Jones was not called at the second trial. There were significant differences which point to the strength of the defense waged by Hager. For example, under cross-examination at the second trial, but not at the first, Kenneth Vaughn stated that Oestricker was drunk and "wanting to fight like crazy—wanting to fight anybody." (*Chamber II* Tr. at 385). Hager also significantly impeached several of the other witnesses. (*See, e.g., Chambers II* Tr. at 581-615) (Testimony of James Fowler).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2383EM

James W. Chambers,
Appellant,

vs.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
For the Eastern District of Missouri.

The panel opinion and judgment entered September15,1989 are vacated, and appellee's suggestion for rehearing en banc is granted. Counsel will be notified as to the time of oral argument. Counsel will each be given thirty days from the date of this order to file any supplemental briefs which are not duplicative of the briefs originally filed. The supplemental briefs shall not exceed fifteen pages.

November 08, 1989

Order entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 88-2383

James W. Chambers,
Appellant,

v.

Bill Armontrout,
Appellee.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: March 16, 1989

Filed: September 15, 1989

Before JOHN R. GIBSON, Circuit Judge, and FLOYD R. GIBSON and HEANEY, Senior Circuit JUDGES

HEANEY, Senior Circuit Judge.

James Chambers appeals his conviction and death sentence of the capital murder of Jerry Lee Oestricker. We reverse because Chambers received ineffective assistance of counsel when his counsel for his second trial failed to interview or to call a witness who would have testified that Chambers acted in self-defense.

I. BACKGROUND

In December of 1982, James Chambers was tried for the murder of Jerry Lee Oestricker in the Circuit Court of Jefferson County, Missouri. At this trial, two eyewitnesses gave conflicting versions of the events immediately preceding the moment that Chambers shot and killed Oestricker outside a bar in Arnold, Missouri.

The government's eyewitness, Fred Ieppert, testified that he saw Chambers first strike Oestricker with a pistol, knocking Oestricker to the ground. Ieppert testified that he then saw Oestricker stand up with his hands in the air, Chambers point the pistor at Oestricker and Chambers fire a single shot into Oestricker's chest.

James Jones, the other eyewitness, had left the bar several minutes before the shooting but had to wait in his car in the bar's parking lot because his engine was flooded. He testified at the first trial to the following: (1) the smaller man (Chambers) came out the bar door first, walked about half the distance of a truck and stood facing the bar door; (2) the bigger man (Oestricker) followed; (3) the two men argued; (4) Oestricker went towards Chambers and struck Chambers in the face, knocking Chambers to the ground; and (5) Chambers stood up and shot Oestricker.

At the first trial, Chambers' attorney requested submission of a self-defense instruction to the jury. The trial court refused, but the court did instruct the jury in the lesser charges of murder in the first and second degree, as well as capital murder. The jury found Chambers guilty of capital murder and sentenced him to death.

On appeal, the Missouri Supreme Court reversed the conviction. *State v. Chambers*, 671 S.W.2d (Mo. banc 1984) (*Chambers I*). It held that there was sufficient evidence to justify an instruction on self-defense, pointing specifically to

Jones' testimony that Oestricker struck Chambers in the face. *Id.* at 783. The court held that a jury could reasonably conclude that Oestricker was the initial aggressor and that Chambers may have shot Oestricker because Chambers feared great bodily harm. *Id.*

Chambers was retried in Jefferson County. His newly appointed counsel for the second trial was Donald W. Hager, a public defender. Hager neither interviewed Jones before trial nor called him to testify on behalf of Chambers. At the conclusion of evidence, Hager requested a self-defense instruction. As with the first trial, the trial court refused. Moreover, Hager was not permitted to argue self-defense in his closing argument. The second trial also resulted in a conviction for capital murder and a sentence of death.

With the assistance of yet another attorney, Chambers again appealed to the Missouri Supreme Court. This time, however, the court affirmed the conviction and death sentence. *State v. Chambers*, 714 S.W.2d 527 (Mo. banc 1986) (*Chambers II*)(Donnelly, J. and Welliver, J., dissenting).

On November 12, 1986, Chambers filed a motion in the Circuit Court of Jefferson County under Missouri Rule 27.26. A hearing on this motion was held on February 3, 1987. The issues raised at this hearing included whether Chambers received ineffective assistance of counsel at his second trial because Hager failed to interview or call Jones at trial. At this hearing, Jones gave a similar account of the incident to the account that he had given at Chambers' first trial. Jones also testified that neither Hager nor anyone else from the public defenders' office had contacted him since the first trial.

Hager also testified at the Rule 27.26 hearing. He conceded that Jones was not contacted by him or anyone else in the public defender's office. Hager stated that he did not interview or call Jones at trial because he felt that Jones' testimony at the first trial contained aspects which were very damaging to Chambers.

Hager testified Jones would testify that Chambers stepped outside first, stopped, turned, and waited for Oestricker, concealing a pistol against his leg, that Chambers pistol-whipped Oestricker and shouted, "Lay there and die," that Oestricker was six feet away and not moving towards Chambers at the time of the shooting, and that Chambers left the scene in a car that was facing the road with its engine running.

Chambers' Rule 27.26 motion was denied by the Circuit Court of Jefferson County. His appeal of that ruling was denied by the Missouri Court of Appeals, and his application for transfer to the Missouri Supreme Court was denied.

Chambers next filed a petition for a writ of habeas corpus in federal court. On habeas, Chambers alleged, *inter alia*, that he was denied effective assistance of counsel at the second trial. The district court held that Hager's performance was above that of a reasonable attorney. In specific reference to Hager's decision not to interview or call Jones at trial, the court concluded that this decision was reasonable because of the damaging aspects of Jones' testimony during the first trial, Jones was not a credible witness, and Chambers signed a pretrial statement in which he agreed with Hager's decision not to call Jones at trial.

Chambers appeals the district court's decision to this Court. On appeal, he raises only one issue that merits our attention: Did Hager's decision not to interview or to call Jones at trial deny Chambers effective assistance of counsel?[1]

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[1] Chambers also raises two other issues: (1) Hager's decision not to interview or call as witnesses Donald Chapman, Eleanor Hotchkiss and Jackie Turner denied Chambers effective assistance of counsel, and (2) Chambers was denied a fair trial by the trial court because it failed to submit a self-defense instruction to the jury. As to the former issue, we have carefully examined the record and find that it is without merit. As to the latter issue, the trial court was correct not to submit the self-defense instruction in light of the fact that, absent Jones' testimony, there is insufficient evidence to support the theory that Chambers acted in self-defense.

II. DISCUSSION

Under the standards for analyzing a claim of ineffective assistance of counsel, enunciated in *Strickland v. Washington*, 466 U.S. 668 (1984), Chambers must show that Hager's performance was deficient and that it prejudiced Chambers' defense. *Id.* at 687. Counsel's performance is deficient if the performance is less than that provided by reasonable counsel under the same circumstances. *Id.*

Chambers alleges that Hager's decision not to interview or call Jones at trial was unreasonable for three reasons. First, Hager's testimony, confirmed by the facts of the case, indicates that there was only one defense on which Chambers could rely. From this, Chambers asserts that Hager's failure to investigate Jones or to call him at trial left Chambers with no defense to capital murder. Second, the seriousness of the charges against Chambers must be considered in assessing the reasonableness of Hager's decision. Finally, an interview with Jones would have given Hager an opportunity either to confirm or to clarify the problems he saw in Jones' testimony at the first trial and to be more effective in his cross-examination of the government witnesses.

We are guided in our determination of whether Hager was reasonable in deciding not to interview or call Jones at trial by the Supreme Court's decision in *Strickland*.

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for

> reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 690-91.

The question before us is whether Hager's less than complete investigation of Jones was reasonable from counsel's perspective at the time that decision was made. In this regard, we must set forth the factual circumstances that a reasonable attorney would have known from the first trial and the likely path the second trial would take.

Chambers has never disputed shooting Oestricker. Chambers has never asserted that he and Oestricker did not argue with each other in the bar. Chambers has never disputed that both he and Oestricker challenged each other to a fight. Chambers did dispute, however, the government's theory that the fight was a ruse on Chambers' part to lure Oestricker outside where he could murder him. Moreover, there was no indication from the state that the testimony at the second trial would significantly differ from the testimony given at the first trial. From this background, reasonable counsel would have anticipated that Chambers' second trial would proceed much like the first trial.

In light of the above facts, we believe that Hager's determination that the negative aspects of Jones' testimony outweighed the positive aspects was unreasonable because the damaging portion of Jones' testimony was either cumulative of earlier testimony given by witnesses for the state or of *de minimis* ef-

fect.[2] Several witnesses testified that Chambers left the bar first and waited for Oestricker. James Fowler, a bar patron, testified that, as the defendant left the bar, he pulled out a gun and then concealed it from view with his body as he waited outside for Oestricker. *State of Missouri v. Chambers*, No. 64709, T. at

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[2] The only damaging testimony of Jones not directly testified to by one of the state's witnesses is that the engine in the waiting car was running and the car was parked in such a manner to permit an immediate exit. Both of these facts, however, were implicit in Dennis Simmons' testimony. Simmons, who was standing about 150 feet from the bar and whose attention was caught by the sound of the gun, testified at the first trial that Chambers ran to a "waiting" car, which sped off immediately. *Chambers I*, T. at 656-57. Simmons also testified that the driver was waiting in the car. Simmons' testimony was not contradicted nor was he extensively cross-examined as to these points. Moreover, reasonable counsel would have concluded that the damaging effect of this testimony, in light of the information available to Hager at the time he made this decision, would have been *de minimus*.

505-07 (*Chambers I*, T.);[3] *State of Missouri v. Chambers*, No. 67191, T. at 568-88 (*Chambers II*, T.). Fred leppert testified that Chambers had a gun at his side. *Chambers I*, T. at 466. Other witnesses testified at both trials that Chambers was pulling a "knife or something" out of his pants as he was leaving. Several witnesses testified that Chambers pistol-whipped Oestricker. *Chambers I*, T. at 465, 508, 556, 645, 654 and 689;

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[3] Fowler's relevant testimony at the first trial proceeded as follows:

> Q [Mr. Finnical, the prosecutor] Did you have an unobstructed view out the door or was it blocked?
>
> A Straight view.
>
> Q Did you see Chambers walk outside?
>
> A Yes, sir; I did.
>
> Q What, if anything, did you see Chambers do when he walked outside?
>
> A As he walked out the door, he made about three or four, maybe five steps. He stepped, had both hands in front of him, more or less turned mostly to the left, the left of his body turned toward the door.
>
> He reached in the front of his shirt, pulled up, I don't know if he grabbed with his right hand or left hand, but he pulled a revolver out of the front of his pants.
>
> He looked back over his shoulder, took two more steps, looked over his shoulder again, and I seen the barrel.
>
> He cocked it, put it down to his side, towards his chest; then he started down toward his side.
>
> Q How far was Chambers outside the door when he finally stopped?
>
> MR. ALLRED [Chambers' counsel]: Object to that. He testified to it. It's repetitious.
>
> THE COURT: Overruled.
>
> Q (By Mr. Finnical) How far outside the door was Chambers when he stopped?

Chambers II, T. at 374-77, 420, 458, 501, 524, 540-41 and 590. Fred Ieppert also testified in the first trial that, after Chambers had knocked Oestricker down to the ground and Oestricker stood up, Oestricker was six feet away and standing when Chambers shot him. *Chambers I*, T. at 464. *See also Chambers II*, T. at 447 (testifying that the distance separating the two was five feet). Numerous witnesses testified that Chambers shouted

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A Approximately twelve foot or so.

Q Twelve foot. Okay. So, if this is the door through which Chambers walked going out that way, I want you to stand out here and walk, do what you saw Chambers walk and do.

A He walked out one, two, three steps, turned around, looked, raised up his shirt, pulled the pistol out, made two more steps, left side back, cocked it, set the gun to his side, then brought it back down to his side. How did he position his body to the door?

A You could see most of his left side at an angle, more of his left side than his full back.

Q Was he looking back or looking towards the parking lot?

A He was looking back at the door.

Q After you saw him cock the gun and put it next to his chest and come to a stop, could you see the gun or was it obstructed by his body?

A It was obstructed by his body.

Q When Chambers walked out of the door and proceeded to get this pistol and proceeded a couple more steps and cocked it —

MR. ALLRED: Object to the leading questions, your Honor.

THE COURT: Overruled.

Q (By Mr. Finnical) Where was Oestricker at the time Chambers was outside with the pistol like this? Was he still inside or outside?

A He was outside, sir.

several epitaphs after shooting Oestricker. *Chambers I*, T. at 466, 509, 542, 566, 680 and 700; *Chambers II*, T. at 330, 360, 375, 420-21, 508 and 591. In sum, other witnesses had testified to the negative aspects of Jones' testimony. Thus, any damaging testimony that Jones gave at the first trial was cumulative.

The state also argues that Hager's decision not to interview Jones was reasonable because Hager's determination that Jones lacked credibility was reasonable. We do not agree. Hager never met Jones nor spoke with him on the telephone. The state fails to point out any evidence upon which a reasonable attorney could determine a witness' credibility. Moreover, the government made no attempt to impeach Jones at the first trial, a fact that is inconsistent with Hager's determination that Jones lacked credibility. Furthermore, the Missouri Supreme Court

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Q Where would you say he was?

A Approximately right here.

Q Did Oestricker have anything in his hands as he walked out the door?

A No, sir; he didn't.

Q Did Oestricker subsequently walk out the door?

A Yes, sir.

Q Was Chambers still standing out there twelve or so feet out?

A Yes, sir.

Q What did you do then?

A I see him pull the pistol and an older man standing next to me hollered out: "He's got a knive."

Q What happened then?

A About the time Oestricker walked out the door I said: "Knife, hell; he's got a gun."

obviously did not view Jones as a witness who lacked crediblity because it based its decision in *Chambers I* on his testimony alone.

This is not a case where further investigation of a potential defense was unnecessary because counsel reasonably intended not to use that defense at trial. *Strickland*, 466 U.S. at 696. The self-defense theory, as either a partial or total defense, was Chambers' only possible defense during either the merits phase or the sentencing phase. This is also not the case where the defendant gave his attorney reason to believe that pursuing certain investigations would be fruitless or even harmful. *Id.* Chambers' signed statement, in which he agreed with Hager's decision not to call Jones,[4] fails to make Hager's conduct reasonable. First, Hager did not rely on Chambers' statement because the text clearly indicates that Hager had already made the decision not to call Jones. Second, even if he had relied on Chambers' advice, rather than using his own professional judgment, Hager's conduct would violate Missouri's Rule of Professional Conduct 1.2(a).

Hager's decision not to call Jones at trial and to rely only on his ability to cross-examine the state's witness in Chambers' defense, given the facts at the time of the second trial, was unreasonable. The decision manifested both arrogance and a failure to adequately appraise his client's situation. The only evidence supporting either the self-defense theory or a verdict of

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[4] Chamber's signed statement is as follows:

> I agree that Mr. Hager need not subpoena or call James Jones at my trial. His cross examination at the first trial was extremely damaging to me and I believe it would be at the second trial. I have been admonished that by not calling James Jones it may not be possible to obtain a jury instruction on self defense.
>
> 4/13/85 /s/ James W. Chambers

guilty of a lesser included offense which Hager could have elicited on cross-examination was that Oestricker was "crazy drunk" and spoiling for a fight. No other witness was prepared to testify that Oestricker knocked Chambers down before the shot was fired. In addition, Hager's decision not to call Jones was based on inadequate investigation. *See Strickland*, 466 U.S. at 690-91 ("strategic choices made after less than complete investigation are reasonable to the extent that reasonable professional judgments support the limitations on investigation"). Moreover, the Missouri Supreme Court implicitly advised Chambers' counsel to call Jones to testify at his second trial. *Chambers I*, 671 S.W.2d at 783.

Thus, both Hager's decision not to interview Jones and his decision not to call Jones at trial were unreasonable and, thereby, meet the "deficiency" prong of *Strickland*. Only Jones' testimony in the first trial contradicted the state's theory of the case. Only Jones' testimony in the first trial -- albeit with the exception of testimony about the argument in the bar and testimony about the differences in size between the two men — provided Chambers with evidence that he killed Oestricker in self-defense. The Missouri Supreme Court had stated that something more than the barroom argument and the differences in physical size — something indicating the immediacy of danger — had to be present to justify a self-defense instruction. *Chambers I*, 671 S.W.2d at 783. Only Jones' testimony in the first trial indicated that there was this immediacy of danger. Nothing in Jones' testimony at the first trial was sufficiently damaging to Chambers, in light of the other testimony, that reasonable counsel would have been justified in not calling Jones. Hager had at his disposal the address and phone number of Jones and a paid investigator was available to locate, interview and subpoena Jones. Most importantly, the second trial was likely to proceed in a similar fashion as the first trial, but

Hager unreasonably failed to follow the Missouri Supreme Court's implicit advice in *Chambers I*.[3]

The question remains whether, in light of all the circumstances, Hager's ineffective assistance of counsel resulted in any prejudice. Prejudice occurs when "there is a reasonable probability that, but for counsel's unprofessional errors," the "result would have been more favorable to the defendant." *Id.* at 694-95; *Sanders v. Trickey*, 875 F.2d 205, 208 (8th Cir. 1989). This standard for determining prejudice is somewhat lower than the preponderance of the evidence standard. *Id.* "A reasonable probablity is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *Byrd v. Armontrout*, No. 88-1903, slip op. at 3 (June 27, 1989).

Jones' testimony had the potential to greatly aid Chambers' case. Jones was a fully disinterested witness who testified that Oestricker hit Chambers before the shot was fired. The only facts that were overwhelmingly conclusive at the second trial were that Chambers and Oestricker engaged in a loud argument, that Chambers shot Oestricker, and that Chambers struck Oestricker in the face with his pistol after shooting him. Chambers did not contest those issues. Rather, Chambers argued that he acted in self-defense or with legal provocation

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[3] Judge Blackmar of the Missouri Supreme Court noted this point in his concurring opinion in *Chambers II*.

> There is a mystery as to why the evidence that the victim struck the defendant, knocking him to the ground, which was held to require a self-defense instruction in the first trial, was not offered in the second.

Chambers II, 714 S.W.2d at 534 (Blackmar, J., concurring). In dissenting from a holding that there was insufficient evidence at the second trial to justify submission of a self-defense instruction, Judge Welliver of the Missouri Supreme Court stated, "The principal opinion, I fear, becomes the best evidence for proof of a charge of ineffective counsel." *Id.* (Welliver, J., dissenting). We agree.

contesting the state's theory that the barroom brawl was just a ruse in Chambers' premeditated and deliberate murder of Oestricker. Only Jones' testimony substantially supported either approach.

Nevertheless, Missouri argues that Chambers cannot make a showing of prejudice because the other evidence against him was sufficiently impressive that his failure to call Jones was not likely to have altered the outcome of the case. Missouri also argues that *Strickland* does not stand for the principle that the reasonable probability of being found guilty of a lesser charge is prejudice.

Missouri's arguments against a finding of prejudice represent misreadings of *Strickland*. *Strickland* does not require Chambers to prove that Jones' testimony would have likely affected the outcome. "[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693. *Strickland* merely requires "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. Thus, Chambers does not have to prove that Hager's ineffective assistance of counsel was outcome determinative. As to the lesser charge issue, Missouri's interpretation conflicts with language in *Strickland* focusing on the "likelihood of a result more favorable to the defendant." *Id.* at 695. Moreover, the state's version is incongruent with the Supreme Court's explicit recognition that prejudice can occur in sentencing alone. *Id.* If a smaller sentence is prejudice, then a conviction of a lesser charge resulting in a smaller sentence also constitutes prejudice.

Considering all the circumstances, there is a reasonable probability that, absent Hager's decision not to interview or call Jones at trial, the jury would have acquitted Chambers of capital murder, either by finding him guilty of a lesser charge or by finding that he acted in self-defense.

III. CONCLUSION

At the time of the second trial, this case appeared to involve a barroom brawl or altercation. Chambers did not, and could not, deny shooting Oestricker. His only defense to the charge of capital murder and the death penalty was that he acted in self-defense. Only one witness could testify to one of the required elements of self-defense to justify submitting the issue to the jury. That witness' harmful testimony would have appeared to reasonable counsel at the time of the second trial to be cumulative. Yet, Chambers' counsel did not interview or call this witness to the stand, although he knew of his existence and testimony and was able to contact him. On these facts, we hold that Chambers received ineffective assistance of counsel. In our view, there is a reasonable probability that, absent this error, Chambers would not have been convicted of capital murder. Therefore, we reverse and remand to the district court to enter an order that the state either retry Chambers within 120 days of this order or free him from custody. The district court shall further order that the state shall notify this court and the district court of its intention in this regard within 45 days of this order.

JOHN R. GIBSON, Circuit Judge, dissenting.

I respectfully dissent.

The court today concludes that trial counsel Hager's failure to interview Jones or to call him as a witness at trial constituted ineffective assistance of counsel under *Strickland*'s tests for reviewing claims of ineffective performance and prejudice. Because I conclude that neither element of the *Strickland* test is satisfied, I would affirm the judgment of the district court denying the writ.

The decision of the Missouri Supreme Court in its consideration of the facts in the case clearly indicates that evidence to support the self-defense instruction could have come only from

Jones,[1] and we know from the record that Jones was not called to testify at the second trial. However, the state trial court, in considering the collateral attack under Missouri's Rule 27.26, concluded that Jones' testimony, on balance, was more damaging than helpful to Chambers. After observing that counsel "could cho[o]se between a weak self-defense theory that carried with it a strengthening of the State's case," or try the case as he did, the state court concluded that the decision not to call Jones

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[1] The Missouri Supreme Court, in reversing the *Chambers I* trial, observed that there was conflicting evidence as to the incident and that "[i]n examining the record for evidence of self-defense, we must consider the evidence in [the] light most favorable to appellant Chambers." *State v. Chambers*, 671 A.Q.2d 781, 783 (Mo. 1984) (en banc). After reviewing the evidence in that manner, the court concluded that "[w]hile the evidence of self-defense is not so unequivocal as to mandate a directed verdict of acquittal, the evidence is sufficient to justify submission of self-defense to the jury." *Id.* at 784.

was a reasonable one.[2] The Missouri Court of Appeals affirmed the conviction, *Chambers v. State*, 745 S.W.2d 718 (Mo. Ct. App. 1987), and Chambers' application for transfer to the Missouri Supreme Court was denied. The district court, in this

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[2] The detailed reasoning of the state trial judge is as follows:

> During this proceeding, Donald Hager testified that the decision not to call Jones was [a] deliberate one, based upon strategic concerns. That, having the benefit of Jones' testimony on cross-examination adduced at the first trial, in his professional opinion, the disadvantages of Jones' testimony outweighed the advantages. The State's cross-examination * * * was highly damaging in that it supported the State's theory of the case under a capital murder submission. Mr. Hager knew that although Jones' testimony would have supported a self-defense instruction, it corroborated the State's main witness — Fred Ieppert — and conflicted with his defense strategy. His strategy at trial was to: 1) attack the credibility of the State's witnesses; 2) suggest that Oestricker had a pair of pliers in his hands; and 3) attempt to negate the element of Chambers reflecting "cooly" upon * * * taking the life of Oestricker. The fact that Jones was in a position to observe the condition of the getaway car with running engine and the distance between the victim and petitioner at the time of the fatal shot would have made this trial strategy almost impossible from a practical standpoint.
>
> * * *
>
> Without Jones' testimony a jury might believe, as at least one [Missouri] Supreme Court Judge did, that the whole matter was just "an ordinary barroom altercation" thus negating the cool reflection that might not exist under those circumstances.
>
> * * *
>
> In light of the foregoing, the Court finds that petitioner's trial counsel's decision not to call Jim Jones was a reasonable one based on his professional judgment in consideration of the evidence and the circumstances in the first trial.

Chambers v. Missouri, No. CV186-4580-CC-J3, slip op. at 12-13 (23d Cir. March 11, 1987). The court also rejected Chambers' claim that he had not read the signed statement which indicated that he agreed with the decision not to call Jones. *Id.* at 14 n.2.

habeas corpus action, concluded that Jones' testimony would have supported the state's theory of the case. It also concluded that because the trial counsel's failure to investigate further resulted from a strategic decision made in the exercise of professional judgment, his performance was not deficient. Because it decided that the trial counsel rendered effective assistance, the district court did not reach the question of prejudice.[3]

I.

The effectiveness component of the *Strickland* test asks whether the defendant received "reasonably effective assistance." 466 U.S. at 687. Moreover, *Strickland* teaches that judicial scrutiny of counsel's performance must be "highly deferential," *id.* at 689, and should eliminate the "distorting effects of hindsight," *id.*

In performing the first part of the *Strickland* analysis, courts distinguish between pretrial preparation and trial strategy decisions. *See Burger v. Kemp*, 483 U.S. 776, 788-95 (1987); *Kimmelman v. Morrison*, 477 U.S. 365, 384-87 (1986); *Darden v. Wainwright*, 477 U.S. 168, 184-87 (1986); *Strickland*, 466 U.S.

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[3] The district court's reasoning is of interest:

> The Court finds reasonable counsel's conclusion that Jones' testimony would have tended to support the state's theory of the case and thus his decision not to call Jones as a witness. This is especially true in view of petitioner's written and signed pretrial statement that he agreed with counsel's decision in this regard. As the United States Supreme Court noted, "[t]he reasonableness of counsel's adtions may be determined or substantially influenced by the petitioner's own statements or actions." *Strickland, supra*, 466 U.S. at 691. Furthermore, counsel reasonably assessed the affect [sic] of Jones' earlier testimony on both the state's theory of the case and Jones' credibility as a witness.

Chambers v. Armontrout, No. 88-0567C(3), slip op. at 12 (E.D. Mo. July 19, 1988).

at 687-91; *United States v. Gray*, 878 F.2d 702, 711 (3d Cir. 1989); *Laws v. Armontrout*, 863 F.2d 1377, 1382-86 (8th Cir. 1988) (en banc), *cert. denied*, 109 S.Ct. 1944, *reh'g denied*, 109 S.Ct. 3179 (1989). "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691. The Third Circuit recently stated: "Ineffectiveness is generally clear in the context of complete failure to investigate because counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." *Gray*, 878 F.2d at 711.

In contrast to the relatively close scrutiny which courts give to an attorney's preparatory activities, greater deference is given to an attorney's informed strategic choices. Indeed, it has been clear since *Strickland* that "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U.S. at 690. In reviewing the performance of counsel, "courts must resist the temptation to second-guess a lawyer's trial strategy." *Laws*, 863 F.2d at 1393 (quoting *Blackmon v. White*, 825 F.2d 1263, 1265 (8th Cir. 1987)). Even a losing strategy "may have been reasonable in the face of an unfavorable case." *Id.* at 1394 (emphasis removed) (quoting *Blackmon*, 825 F.2d at 1265).

Chambers attempts to formulate arguments based upon Hager's allegedly inadequate investigation. However, as the Seventh Circuit observed:

> When the allegation of the ineffectivness of counsel centers on a supposed failure to investigate, we cannot see how, especially in the context of a habeas proceeding that collaterally attacks the state court conviction, the petitioner's obligation can be met without a comprehensive

> showing as to what the investigation would have produced. The focus of the inquiry must be on what information would have been obtained from such an investigation and whether such information, assuming its admissibility in court, would have produced a different result.

United States ex rel. Cross v. DeRobertis, 811 F.2d 1008, 1016 (7th Cir. 1987).

Hager, trial counsel in Chambers' second trial, read the transcript of Jones' testimony in the first trial and concluded that it was more damaging than helpful. The only reason to interview Jones would have been to see if he would change his story. Hager decided not to interview Jones because even any substantial changes in his story would create an excessive danger of devasting impeachment. *Chambers v. State*, 745 S.W.2d at 720. Thus, although Chambers claims that he is challenging Hager's preparation, he is, in fact, attempting to challenge these strategic decisions by Hager.

My review of the record convinces me that both the state trial court and the district court properly assessed Jones' testimony. At the first trial, Jones testified that Chambers arrived in a car which was turned to face the exit of the parking lot. (Tr. first trial 748). As Chambers entered the building, the car was left running and was still occupied by the driver. (Tr. 748-49). Jones testified that he saw Chambers come out the door, get about half the distance of an automobile or truck, and turn half-way toward the door. (Tr. 738). Oestricker followed Chambers out the door and struck Chambers hard enough to knock him down. (Tr. 738). Chambers then got up, took a step forward, and shot Oestricker. (Tr. 738). However, on cross-examination, Jones revealed that when Chambers walked out the door and turned around half-way, he already had a pistol in his hands, (Tr. 740), with the gun against his leg and positioned behind him, (Tr. 741). Oestricker was just emerging through the door when Chambers stopped, turned around with the gun

in hand, and waited for Oestricker to come out. (Tr. 741-42). Jones testified that he had not seen Oestricker attempt to strike Chambers before Chambers initially took the gun out. (Tr. 742). According to Jones, after Chambers shot Oestricker, Chambers said either "[t]ake that tough guy," or "[t]ake that." (Tr. 742). After being shot, Oestricker made a grunting sound and backed up three or four steps. (Tr. 742). Chambers then walked toward him and slapped him in the head with the pistol "over and over again." (Tr. 742-43). Oestricker was standing about six feet away from Chambers at the time of the shot and was not moving toward Chambers. (Tr. 747). Jones also said that, after shooting Oestricker, Chambers walked into the building and asked "if anybody else wanted any of this." (Tr. 746). As he left the building, Chambers said to Oestricker, "Lay there and die." (Tr. 747).

Based upon this testimony, I cannot conclude that trial counsel acted in any unreasonably ineffective manner by deciding not to call Jones. Even if Jones' testimony supported a self-defense instruction, as the Supreme Court of Missouri held, the testimony also indicated that Chambers, with a pistol concealed against his leg, waited for Oestricker to come out the door and, after being struck, fired the fatal shot while Oestricker was six feet away and was not moving toward him. Chambers, after threatening the crowd in the bar, then ran to the car which had waited for him, with its motor running, during the entire incident.

While the question of whether there was evidence to support the giving of a self-defense instruction involves consideration of the evidence in the light most favorable to Chambers, a professional evaluation of the trial impact of the testimony involves consideration of that testimony in the light that the jury would consider it. This is a far broader analysis and I cannot conclude that Hager was unreasonably ineffective in his assessment of the impact of the Jones testimony on the jury. The Supreme Court has refused to find ineffective assistance where a lawyer did not

introduce helpful evidence which, in turn, could have led to the introduction of other more harmful testimony. *See Burger*, 483 U.S. at 788-95; *Darden*, 477 U.S. at 184-87. The testimony of Jones presented just such a dilemma for Hager, and we should follow the teaching of the Supreme Court by refusing to conclude that there was ineffective assistance in this respect.

It is also important to consider the fact that, before the second trial, Chambers signed a statement in which he agreed with the decision not to call Jones. The Supreme Court stated in *Strickland* that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions," 466 U.S. at 691, and that those statements are critical to a proper assessment of litigation decisions, *id.* When this statement is considered in combination with the content of Jones' testimony at the first trial, I am convinced that the decision not to call Jones was reasonable under *Strickland*.

Furthermore, even if the trial counsel should have called Jones, the *Strickland* test is not satisfied unless Chambers can also demonstrate "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. In order to prove prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is defined as one which is "sufficient to undermine confidence in the outcome." *Id.* After a thorough examination of the record, I conclude that there is not a reasonable probability that the introduction of Jones' testimony would have changed the outcome of the second trial.

Accordingly, I would affirm the judgment of the district court denying the writ.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-0567C(3)

James W. Chambers,
Petitioner,

v.

Bill Armontrout,
Respondent,

ORDER

A memorandum dated this day is hereby incorporated into and made a part of this order.

IT IS HEREBY ORDERED that the second amended petition for writ of habeas corpus filed by James W. Chambers pursuant to 28 U.S.C. § 2254 is denied on its merits.

IT IS HEREBY FURTHER ORDERED that, to the extent they remain before the Court, the parties' separate requests for hearings and respondent's motion to reconsider are denied as moot.

IT IS HEREBY FURTHER ORDERED that the stay of execution entered on June 20, 1988, is extended from July 20, 1988, to August 20, 1988.

Dated this 19th day of July, 1988.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-0567C(3)

James W. Chambers,
Petitioner,

v.

Bill Armontrout,
Respondent.

MEMORANDUM

This matter is before the Court on the petition for writ of habeas corpus filed by James W. Chambers pursuant to 28 U.S.C. § 2254.

In 1985, petitioner was convicted of capital murder in the 1982 death of Jerry Lee Oestricker.[1] The jury recommended the death penalty and petitioner was sentenced accordingly. On direct appeal, the Missouri Supreme Court affirmed the conviction and sentence. *State v. Chambers,* 714 S.W.2d 527 (Mo. 1986) (en banc). Thereafter, petitioner filed in state court a request for relief under then-effective Missouri Supreme Court Rule 27.26 which was denied. The Missouri Court of Appeals affirmed that ruling. *Chambers v. State,* 745 S.W.2d 718 (Mo. App. 1987).

On March 23, 1988, petitioner filed in this Court his original pro se petition for writ of habeas corpus pursuant to 28 U.S.C.

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[1] This was a retrial after the Missouri Supreme Court reversed petitioner's earlier conviction for Mr. Oestricker's death. *State v. Chambers,* 671 S.W.2d 781 (Mo. 1984) (en banc) ("Chambers I"). That decision overturned the first conviction based on a finding the evidence introduced at petitioner's December 1982 trial warranted a self-defense instruction that had been refused by the trial court. *Id.*

§ 2254. Petitioner's appointed counsel subsequently filed amendments to that petition. Now before the Court are four claims[2] for federal habeas relief based on alleged violations of due process and effective assistance and counsel guarantees of the fifth, sixth, and fourteenth amendments to the United States Constitution.

In particular, petitioner alleges (I) he was denied the effective assistance of trial counsel by that attorney's failure to interview and call as witnesses Donald Chapman, James Jones, and Eleanor Hotchkiss; (II) he was denied effective assistance of trial counsel by that attorney's failure to locate and interview witnesses at an eye doctor's office where petitioner reportedly made certain incriminating statements; (III) he was denied a fair trial when the trial court refused to give a self-defense instruction offered by petitioner; and (IV) he was denied a fair trial when the trial court denied petitioner's motion for change of venue due to pretrial publicity.

Respondent does not contend petitioner has failed to exhaust any of these claims. Thus, the Court finds the exhaustion prerequisite to federal habeas relief has been satisfied. *See* 28 U.S.C. § 2254(b).

Respondent does urge, however, that petitioner is barred from pursuing his claim of ineffective assistance of trial counsel due to that attorney's failure to interview and call as a witness Eleanor Hotchkiss. Respondent argues that petitioner did not present evidence on this claim during the hearing on his post-conviction proceeding and did not raise the issue on appeal therefrom. Since petitioner has not shown "cause" for failing to do so, the attorney's decision not to investigate Ms. Hot-

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[2] Petitioner's second amended petition, the petition now before the Court, does not reiterate several claims set forth in petitioner's original and first amended petitions. Thus, the Court does not now address those claims.

chkiss further was reasonable, and the evidence at trial was overwhelming, respondent contends petitioner has not satisfied the "cause and prejudice" test of *Wainwright v. Sykes,* 433 U.S. 72 (1977). Petitioner counters that the Court need not consider this as a separate matter because this claim is intertwined with the ineffective assistance of counsel claim regarding Donald Chapman and James Jones, citing *Smith v. Wolff,* 506 F.2d 556 (8th Cir. 1974). The Court finds *Smith* allows the consideration of this claim, since it is intertwined with the other ineffective assistance of counsel claims. Thus, the Court will consider the merits of this claim along with petitioner's other ineffective assistance of counsel claims.

A. Ineffective Assistance of Counsel Claims[3]

Petitioner alleges that Donald Chapman's testimony at the post-conviction proceeding shows that (1) on the evening of May 29, 1982, he drove to the Country Club Lounge with petitioner, Eleanor Hotchkiss, and Jackie Turner to find a boat and a lantern for fishing; (2) he parked facing the street and watched in the rearview mirror for petitioner to come out of the tavern; (3) he saw petitioner come out, followed by Mr. Oestricker; (4) he saw petitioner "smacked dead in the face" by Oestricker and then fall backwards; (5) once the fight started, Mr. Chapman watched through the rear window of his car; and (6) Oestricker started toward petitioner again, petitioner "jumped up and they grabbed each other and I heard a shot go off."

Petitioner alleges James Jones' testimony at the post-conviction proceeding shows that (1) he was in his car on the parking lot of the Country Club Lounge the evening of May 29, 1982; (2) he saw a small man come out of the tavern followed by a big man, he heard the two men exchange a few words, and

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[3]Petitioner is alleging his counsel at his second trial, not his first trial, was ineffective.

then he saw the big man hit the small man; (3) the small man started to get up and shot the big man with a gun the small man had in his hand when he came out of the tavern.

Petitioner alleges Eleanor Hotchkiss' affidavit, which was submitted to this Court with "petitioner's reply to respondent's response to order to show cause," shows (1) she was in the car with Donald Chapman, Jackie Turner, and petitioner when, during the evening of May 29, 1982, they drove to the Country Club Lounge looking for a boat and lantern; (2) just prior to and during the ride to the lounge, she heard no mention of Jerry Oestricker's name; (3) when they arrived at the lounge, petitioner got out of the car saying, "I'm going to go in to see about a boat and a lantern;" (4) while petitioner was gone, she was sitting in the car, facing away from the lounge; and (5) she did not "see anything that happened outside the bar and then [she] heard a gunshot. [She] was scared then."

Petitioner further alleges that testimony at the post-conviction proceeding from one of the eye doctor's patients shows petitioner did not make the allegedly incriminating statements reportedly made by him on January 3, 1985, at an eye doctor's office in Arnold, Missouri.

Each of these potential witnesses stated that petitioner's trial counsel did not contact or attempt to contact them. Petitioner now urges the failure to investigate and present these individuals at the second trial constituted ineffective assistance in light of the fact self-defense was petitioner's defense; there was no eyewitness testimony at trial of exactly what occurred when the two men first left the lounge; and petitioner was trying to negate the State's theory that petitioner cooly deliberated on the murder prior to the incident.

In construing the constitutional requirement for effective assistance of counsel, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having

produced a just result." *Strickland v. Washington,*, 466 U.S. 668, 686 (1984). The Court determines whether counsel's performance was deficient and, if so, whether the deficient performance prejudiced the defense. *Id.* at 687. In analyzing counsel's performance, the Court must determine whether, under all the circumstances, the "identified acts or omissions were outside the range of professionally competent assistance." *Id.* at 690. This review is highly deferential for there is a strong presumption that counsel's conduct "falls within the wide range of reasonable professional assistance." *Id.* at 689. With respect to the duty to investigate, the Supreme Court stated:

> [C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

Id. at 691.

A deficient performance alone is insufficient to find counsel was ineffective. The Court must also find prejudice resulted from such performance. To establish the prejudice element, petitioner must show

> there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. . . . When a [petitioner] challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt.

Id. at 694, 695. In making this determination, the Court "must consider the totality of the evidence before the judge or jury." *Id.* at 695.

When a state court has rendered specific findings regarding historical facts underlying the attorney's performance, those findings are presumed correct in the related federal habeas proceeding unless certain exigencies exist. 28 U.S.C. § 2254(d); *Sumner v. Mata,* 449 U.S. 539 (1981); *Kellogg v. Curr,* 741 F.2d 1099, 1101 (8th Cir. 1984). While such a presumption attaches to any facts underlying an ineffective assistance of counsel claim, it does not apply to the state court's ultimate conclusion about whether or not petitioner's counsel rendered effective assistance. *Strickland, supra,* 466 U.S. at 698; *Kellogg, supra,* 741 F.2d at 1101. Here, the Missouri Court of Appeals analyzed the claims that petitioner's trial counsel was ineffective in not investigating and presenting Donald Chapman, James Jones, or the persons at the eye doctor's office. Petitioner does not contend any circumstance precludes the application of the presumption of correctness, and this Court finds the state courts' findings supported by the record. Thus, the Court considers as correct the following relevant facts as found by the state appellate court:

> In brief, the evidence showed [that on the evening of May 29, 1982,] appellant went to a lounge in Arnold, Missouri and sought out the victim. Appellant initiated an argument with the victim and coaxed the victim to settle the matter outside of the establishment. Appellant departed the establishment first and drew a handgun on his way out. As the unarmed victim exited the lounge, appellant struck the victim over the head with the gun. The victim rose to his feet with his hands in the air. Appellant fired a single shot into the victim's chest. Appellant then proceeded to pistol whip the victim, dragged the victim across the parking lot, and taunted him. Thereafter, appellant ran to the passenger side of an awaiting automobile and fled the scene. Following the incident, a pair of needle-nosed pliers was found lying next to the victim's body. The owner of the lounge, however, testified the pliers were his and had dropped from his pocket after the incident when he reach-

ed for a handkerchief while standing over the victim's body.

The State's theory of the case under the capital murder submission was that appellant intended to cause the death of the victim and reflected upon the matter cooly and fully before doing so in that appellant sought out the victim, appellant drew a handgun and waited for the unarmed victim to exit the establishment, and appellant had a getaway car waiting so that he could quickly flee the scene.

At the 27.26 motion hearing, appellant's counsel from his second trial testified it was his trial strategy to undermine the credibility of the state's witnesses and to suggest the victim had a pair of needle-nosed pliers in hand at the time of the incident in order to get a self-defense instruction.

At appellant's first trial, a witness, Jim Jones, was called to testify in appellant's defense. Jones was not called to testify at appellant's second trial. It was this witness' testimony that was central to the Supreme Court's decision in *Chambers I, supra,* requiring reversal on grounds the trial court failed to instruct on self-defense where the instruction was warranted. Jones testified during the first trial that he was in the parking lot of the lounge on the night in question and witnessed the shooting. It was Jones' testimony that the victim struck appellant first, appellant fell backwards and as appellant was rising to his feet, he shot the victim.

On cross-examination, however, Jones testified to facts adverse to appellant's case. Jones substantiated the state's case that appellant had the handgun drawn before the victim exited the lounge and that the victim was unarmed. Moreover, Jones testified the victim was six feet away from appellant and was not advancing towards appellant when appellant fired the shot. Jones also testified that appellant

pistol shipped the victim and told the victim to "lay there and die." Jones' testimony also supported the state's theory of a getaway car as Jones testified the vehicle in which appellant fled the scene was waiting in the parking lot the entire time with the engine running and was parked in a position facing out towards the exit.

At the motion hearing, appellant's counsel acknowledged he did not interview Jones but did read the transcript of his testimony from the first trial. Counsel considered Jones' testimony very damaging to appellant and concluded Jones, for impeachment purposes, was locked into his testimony from the first trial. Counsel testified further that appellant was emphatic about the decision not to call Jones and signed a statement to that effect. The signed statement was introduced at the motion hearing. In that statement appellant agreed Jones should not be called as a witness and acknowledged that failure to call Jones might prevent appellant from receiving a self-defense instruction.

Donald Chapman, the driver of the vehicle in which appellant fled the scene of the crime, did not testify at either of appellant's trials. Chapman, a first cousin of appellant, was arrested in connection with the murder for driving the getaway car. Chapman gave recorded statements to the police after the incident. At the motion hearing, Chapman testified he witnessed the incident from the rear window of the automobile. It was Chapman's testimony that the victim struck appellant first, hitting appellant in the face and knocking him backwards. Appellant then jumped up, the two men struggled, and a shot went off.

Appellant's counsel acknowledged he did not interview Chapman. Counsel, however, did have transcripts of the statements Chapman made to the police. Counsel found these statements damaging and did not consider Chapman a credible witness in light of the fact he was arrested in connection with the incident.

At appellant's second trial, Deputy Sheriff Kentch testified that while appellant was in custody the deputy accompanied appellant to an appointment with an eye doctor. While in the waiting room of the doctor's office, appellant made statements the substance of which were that he had killed a man in Arnold and would kill two police officers if given the opportunity.

At the motion hearing, a patient who was at the doctor's office testified he was present when appellant was brought into the waiting room but did not hear appellant make the statements the deputy testified to. The patient acknowledged, however, that he had a hearing problem and was present in the waiting room with appellant no longer than five minutes.

At the motion hearing, appellant's former counsel testified he did not interview the employees or patients of the doctor. Counsel testified further that he was made aware of the incident by the prosecution through discovery only one week before trial. Counsel interviewed Deputy Kentch and found him credible. He spoke with appellant and appellant gave counsel the name of a deputy who was allegedly present at the doctor's office and would contradict Deputy Kentch. Counsel's preliminary investigation revealed this deputy was not present at the doctor's office with appellant and Deputy Kentch. Counsel testified he thereafter made the decision to spend the last few days before trial on other matters pertaining to appellant's defense. Counsel testified appellant had sent counsel on wild goose chases in the past and considered this another such incident. Counsel, however, did file a motion in limine to prohibit Deputy Kentch's testimony and cross-examined the deputy at trial as to why he never prepared a full report of the incident.

> . . . [T]he [motion] court concluded there was no evidence that any of the doctor's employees or patients would have contradicted the deputy's testimony.

Chambers, supra, 745 S.W.2d at 719-21.

At the post-conviction hearing, petitioner's trial counsel testified about his decision not to call Eleanor Hotchkiss. In particular, counsel stated he remembered thinking it was damaging that "she said when Chambers came out to the car after the shooting he was so calm about it that it scared her." Respondent's Exhibit F-2, Supplemental Transcript on Appeal to the Missouri Court of Appeals Eastern District at 39.

Upon careful consideration of the record, the Court finds reasonable trial counsel's conduct in not pursuing further the witnesses at issue here. This is not an instance where counsel failed to pursue any investigation, did not engage in a strategic decisionmaking process, or failed to represent petitioner during trial. Indeed, the record reflects that after his entry of appearance on September 28, 1984, counsel sought reduction of petitioner's bond; pursued two motions for change of venue; interviewed several persons with knowledge of the incident; sought various types of relief during voir dire, including successful requests for individualized questioning and for the exclusion of those who had read pretrial newspaper articles regarding the case; and, during the first phase of the trial, pursued various motions in limine, cross-examined almost all of the state's witnesses, proposed jury instructions, and gave closing argument. Counsel had the benefit of and reviewed the earlier trial transcript; conversed with petitioner on several occasions prior to trial; and reviewed available statements made by Hotchkiss, Jones and Chapman.

The Court finds reasonable counsel's conclusion that Jones' testimony would have tended to support the state's theory of the case and thus his decision not to call Jones as a witness. This is especially true in view of petitioner's written and signed pretrial

statement that he agreed with counsel's decision in this regard. As the United States Supreme Court noted, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the petitioner's own statements or actions." *Strickland, supra,* 466 U.S. at 691. Furthermore, counsel reasonably assessed the affect of Jones' earlier testimony on both the state's theory of the case and Jones' credibility as a witness.

Counsel's concern that Chapman's inconsistent statements to the police and his arrest for the incident would undermine his credibility to a significant degree was also reasonable. Thus, the choice not to investigate further or call Chapman was reasonable under the circumstances.

Counsel's decision not to pursue further the incident at the eye doctor's office was also within the bounds of reasonable professional judgment. The Supreme Court has stated that

> [c]ounsel's actions are usually based, quite properly, . . . on information supplied by defendant. . . . [W]hat investigation decisions are reasonable depends critically on such information . . . . [When] a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless . . ., counsel's failure to pursue those investigations may not later be challenged as unreasonable.

Id. Here, counsel learned of the eye doctor office incident a short time prior to trial. Counsel investigated the person suggested by petitioner to counter the apparently damaging testimony, and that investigation did not support petitioner's position. Moreover, this was not the first time counsel had investigated something at petitioner's behest, only to find the information did not support petitioner's position. Thus, petitioner had given counsel reason to believe further investigation of this matter at that time might be fruitless. Under the circumstances, it was reasonable for counsel not to pursue the eye doctor office witnesses further.

With respect to Hotchkiss, counsel reasonably determined that her stated fear upon petitioner's return to the vehicle would not assist petitioner. This witness did not observe what occurred prior to the shooting. The averments in her affidavit about the lack of references to the victim prior to their arrival at the lounge might conceivably assist only in negating any element of premeditation or cool deliberation. Such potential was severely undermined, however, by her expressed fear. Additionally, to the extent petitioner sought to focus on self-defense, Ms. Hotchkiss' testimony does not clearly assist that endavor.

None of the decisions by counsel to forego further investigation of these witnesses resulted from a blanket policy not to investigate. Rather, each was a result of a strategic decision made in the exercise of professional judgment based on information then available to counsel and based on his experience with petitioner. Thus, the Court finds trial counsel's performance was not deficient. Since the Court has not found petitioner's attorney's performance deficient, the Court need not and will not address the prejudice prong of the *Strickland* test for constitutionally ineffective assistance of counsel.

B. Denial of Fair Trial for Failure to Submit Self-Defense Instruction

Petitioner alleges there was "the sufficient quantum of evidence in the record to warrant submission of the [self-

defense] instruction" offered by petitioner.[4] In particular, petitioner asserts questions regarding whether or not the victim was the initial aggressor and whether petitioner had a reasonable belief in the necessity of using deadly force should have been submitted to the jury. Thus, petitioner argues, the refusal of the trial court to give that instruction denied petitioner his federal constitutional right to a fair trial.

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[4] The self-defense instruction offered by petitioner provided as follows:

> One of the issues in this case is whether the use of physical force against Jerry Oestricker was justifiable. The use of physical force including the use of deadly force is justifiable if used in lawful self-defense. On that issue you are instructed as follows:
>
> 1. The state has the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense. If the evidence in this case leaves in your mind a reasonable doubt as to whether the defendant acted in lawful self-defense in using physical force against Jerry Oestricker, you must find the defendant not guilty.
>
> If the defendant was not the initial aggressor in the encounter with Jerry Oestricker and if the defendant reasonably believed it was necessary to use deadly force to protect himself against what he reasonably believed to be the use of unlawful force putting himself in an imminent danger of serious physical injury at the hands of Jerry Oestricker, then the defendant acted in lawful self-defense and must be acquitted.
>
> 2. In determining whether or not the defendant acted in lawful self-defense you should consider all of the evidence in the case.
>
> If Jerry Oestricker prior to the encounter made threats which were known by or communicated to the defendant, you may consider such threats as explaining the conduct or apprehensions of the defendant at the time of the encounter and for the further purpose [sic] of determining who was the aggressor.

Federal habeas relief "is not available because of improper jury instructions unless the error constitutes a fundamental defect that resulted in a complete miscarriage of justice or so infected the entire trial as to deprive the defendant of a fair trial." *Berrisford v. Wood,* 826 F.2d 747, 752 (8th Cir. 1987), *cert. denied,* 108 S.Ct. 722 (1988); *Williams v. Lockhart,* 736 F.2d 1264, 1267 (8th Cir. 1984); *see Cupp v. Naughton,* 414 U.S. 141, 147 (1973) ("it must be established . . . that [the instruction] violated some right which was guaranteed by the Fourteenth Amendment"). This standard applies to a habeas petitioner's claim that submitted instructions were improper, as well as to a habeas petitioner's claim that the refusal to give an instruction was improper. *See Williams, supra* (applying the standard to a habeas petitioner's attack on the impropriety of (a) a submitted instruction, and (b) a refused instruction). Notably, "[n]either due process nor any other constitutional guarantee is offended by a trial judge's refusal to charge the jury on a matter not presented by the evidence." *Hallowell v. Keve,* 555 F.2d 103, 107 (3d Cir. 1977).

> The question of whether there is sufficient evidence to warrant submission of an issue to the jury is a question of law based on the historical facts developed at trial. While a federal court [in a habeas case] may apply the law to a given set of facts as it deems appropriate, a presumption of correctness attaches to all underlying factual determinations made by a state court.

Meclchior v. Jago, 723 F.2d 486, 493 (6th Cir. 1983), *cert. denied,* 466 U.S. 952 (1984). Additionally, if a state court's interpretation of its own law is not an "obvious subterfuge to evade consideration of a federal issue," then a federal district court is bound by that interpretation. *Hallowell, supra,* 555 F.2d at 107.

Here, petitioner does not contest the propriety of the state supreme court's interpretation of Missouri law on the use of

deadly force in self-defense as set forth in *Chambers I.* Nor does this Court find that interpretation is a subterfuge to the determination of any federal constitutional issue. Thus, this Court finds that Missouri law allows the use of deadly force in self-defense

> only when there is (1) an absence of aggression or provocation on the part of the defender, (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defender's belief in such necessity, and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life.

Chambers I, supra, 671 S.W.2d at 783.

In its review of petitioner's second conviction, the Missouri Supreme Court analyzed the sufficiency of the evidence in light of petitioner's challenge to the trial court's refusal to give the proposed self-defense instruction. Petitioner has not contested in these proceedings the propriety of the state supreme court's factual findings regarding the evidence at trial. Furthermore, this Court determines those findings are supported by the record. Therefore, the Court finds those findings are correct and the evidence at petitioner's second trial established the following:

> The chain of events which ultimately led to the slaying of Jerry Lee Oestricker began and ended at the Country Club Lounge in Arnold, Missouri. At approximately 7:00 p.m. on May 29, 1982, Oestricker, who was playing pool and drinking, bumped into the chair of another patron of the bar, Jackie Turner. Turner was seated at a table with members of his family. Immediately after Oestricker bumped into Turner's chair, the two men began to argue. Before this verbal confrontation progressed any further, Kenneth Vaughn, the owner of the bar asked the parties in-

volved in the argument to leave the bar. The Turner family departed, but Oestricker remained at the bar and continued to play pool.

Defendant made his first appearance that evening at the Country Club Lounge at approximately 10:00 p.m. Upon entering the bar, he asked an employee, Norma Jean Ieppert, where he could find the Turners. When Mrs. Ieppert informed defendant that the Turners had left the bar earlier in the evening, defendant immediately departed. Defendant, however, returned approximately 30 minutes later in the company of Jackie Turner.

Once inside the bar, defendant immediately approached Oestricker and asked the victim to buy him a drink. Oestricker, referring to defendant by his nickname, "Bimbo", indicated in strong language that he had no desire to buy defendant a drink. During this initial confrontation between defendant and Oestricker, no blows were exchanged and one witness who was present at the time, Fred Ieppert, testified that this initial exchange of words was loud. And he testified further that defendant told the victim, "I thought you were a friend of mine." To this statement, Oestricker replied, "No, you are no friend of mine." This exchange of words was corroborated by the testimony of a number of other witnesses who were present that evening. After a few minutes had passed, the owner of the bar, Kenneth Vaughn, told the two men to leave the bar.

The evidence presented at trial leaves no room for doubt that defendant exited the bar before the victim. Defendant contends that Oestricker, whose blood alcohol level was determined to be .14[,] was "crazy drunk" and "trying to get a fight going with anybody he could." And there was evidence that before leaving the bar, Oestricker told defendant that "[defendant] didn't scare him" and "if you want a piece of my ass just come on."

A total of five witnesses, all of whom were present immediately before and after Oestricker was shot, testified that defendant, as he was leaving the bar, turned to Oestricker and yelled, "come on mother-fucker we'll settle this outside." Each of these witnesses testified that defendant began the entire confrontation when he approached Oestricker and asked the victim to buy him a drink.

The State presented testimony from a number of witnesses that as defendant walked out of the bar, he reached under his shirt and removed an object. One patron, thinking defendant had pulled a hidden knife yelled to Oestricker, ". . . he's got a knife." There was no testimony that the victim was armed with a weapon of any kind. Defendant, however, contends that there was evidence to suggest Oestricker was in possession of a pair of needlenose pliers which were found near the victim's body. However, the owner of the bar testified that the pliers belonged to him and fell out of his pocket when he removed a handkerchief to wipe his nose while standing over the victim.

Within seconds after Oestricker stepped outside the front door, a single shot was heard. Fred Ieppert, who testified that he witnessed the shooting, stated that as Oestricker walked through the door, he saw defendant hit Oestricker with a pistol, knocking him to the ground. As Oestricker got up with his hands raised in the air, defendant pointed the pistol at the victim and fired a single shot into the victim's chest. Not a single witness testified that Oestricker was the first to strike a blow, or even had the opportunity to do so.

Further, testimony was presented that after shooting Oestricker, who by that time was lying prostrate on the ground, defendant proceeded to pistol whip the victim about the face, drag him across the parking lot, and taunt

> him with the following statements: "take that you motherfucking tough guy" and "get up motherfucker and fight like a man". And defendant also told the mortally wounded victim, "You better get up and call the hospital because you are going to die." Seconds later defendant yelled to the patrons inside the bar, "if any of the rest of you motherfuckers want some of this, come on out." Thereafter, defendant ran from the scene and fled in a waiting automobile. He was apprehended later that evening by Arnold police at a liquor store in St. Louis County.

Chambers, supra, 714 S.W.2d at 529-30.

In light of these findings and applicable state law, the Court cannot say petitioner's federal right to due process was violated by the trial court's refusal of petitioner's proferred instruction. Petitioner is the one who approached the victim inside the tavern. While the men may have exchanged strong words, no physical attacks occurred inside. The departure of the two men was instigated by the tavern owner. There is no evidence that the victim initiated any physical aggression, placing petitioner in immediate danger of serious bodily injury or death. At the time of the shooting, the participants were outside. They were in an open area which reasonably provided petitioner with an opportunity to flee or to use a response short of using a gun if any physical aggression by the victim occurred in the short time prior to the shooting after the men left the lounge. There is no evidence to suggest the victim had a deadly weapon in his possession when he left the tavern. Yet the evidence shows petitioner had a deadly weapon in his possession as he left. Moreover, petitioner's belief that deadly force was necessary simply does not appear reasonable. Under the circumstances, the trial court's refusal of petitioner's self-defense instruction does not warrant habeas relief.

C. Denial of Fair Trial Due to Denial of Motions for Change of Venue

Petitioner alleges he was

> denied his right to a fair trial under the Fifth and Fourteenth Amendments because the trial court denied petitioner's Motion for Change of Venue despite the prejudice of the inhabitants of Jefferson County, against petitioner, due to extensive pre-trial publicity.

In particular, petitioner alleges that over a three-year period, the newspaper articles, to which the parties stipulated, showed that Jefferson County residents "were subject to several different barrages of incriminating publicity regarding petitioner." Petitioner points to repeated references to him as being a convicted killer, as having received the death penalty after the first trial, as having four prior felony convictions, and as having been out on a pass from a state correctional facility on May 29, 1982. Additionally, petitioner points to newspaper editorials criticizing decisions of the Missouri Supreme Court and of the Missouri state parole board relating to petitioner.

In deciding whether or not pretrial publicity unconstitutionally affected petitioner's criminal trial, the relevant inquiry is not simply whether adverse pretrial publicity existed, but "whether the jurors at [the] trial had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount,* 467 U.S. 1025, 1035 (1984), *citing Irvin v. Dowd,* 366 U.S. 717, 723 (1961). In other words, the issues are (a) whether each juror seated was truthful when the juror swore it was possible to set aside any opinion held and decide the case on the evidence; and (b) should the juror's statement of impartiality be believed. *Id.* at 1036. These questions are questions of historical fact to which the presumption of correctness applies in a subsequent federal habeas proceeding as long as the record fairly supports the state court's conclusion. *Id.* at 1037-38. Here, petitioner does not contest the propriety of applying the presumption of correctness and the Court finds that the record supports the relevant factual findings made by the Missouri Supreme Court in its review of the record in response to petitioner's argument that the trial court erred in refusing to sustain

his motions for a change of venue. Specifically, the Missouri Supreme Court found "[a]ll of the potential jurors were closely questioned on whether they had read or heard anything about the crime with which [petitioner] was charged and about their ability to be fair and impartial. The trial judge's concern for the danger of a tainted jury is quite evident from the cautious manner in which he proceeded." *Chambers, supra,* 714 S.W.2d at 532.

Additionally, the record reflects that the trial judge excused any jurors indicating they had read newspaper articles published in local publications within a week or two prior to the commencement of trial. One person on the jury panel who stated that, at the time of the incident, she had seen a paper with a picture of the lounge and a statement describing what had happened, was not selected as a juror in petitioner's trial. Of the twelve jurors and one alternate selected to sit during petitioner's trial, only two were specifically questioned regarding any statements they may have seen or heard about the case. One, who was released prior to deliberations due to a family emergency, stated she remembered seeing petitioner's name "but [she] had no idea as to what [she] may have read;" and she had no knowledge of any of the details about the case. The other juror stated he had not read any of the newspaper articles that were published and had not heard anything about the case.

Notably, petitioner does not direct the Court's attention to any particular juror who was allegedly, improperly biased by any pretrial publicity. Nor does petitioner contend any of the published articles were false.

Based on the available record, the Court finds that the jurors who were ultimately seated had not formed an opinion about the incident and could base their decision on the evidence presented. The impartiality of the jury is fairly supported by the record. Futhermore, the Court finds the publicity did not in and of itself necessitate a change of venue prior to jury selection. Chambers is not entitled to habeas relief on this ground.

In light of the foregoing, petitioner's request for habeas relief will be denied on the merits. To the extent the parties' separate requests for hearing and respondent's motion to reconsider remain pending, those requests will be denied.

Dated this 19th day of July, 1988.

/s/ William L. Hungate
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 88-0567C(3)

James W. Chambers,
Petitioner,

v.

Bill Armontrout,
Respondent.

JUDGMENT

The issues in this case having come before the Court, the Honorable William L. Hungate, District Judge, presiding, on the petition of James W. Chambers for writ of habeas corpus; the issues having been duly presented and considered; and a decision having been rendered,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that petitioner James W. Chambers take nothing by his cause of action against respondent Bill Armontrout, and the same is dismissed with prejudice.

Each party shall bear its own costs.

Eyvon Mendenhall, Clerk

By /s/ Lisa Kollasch
Deputy Clerk

Dated this 19 day of
July, 1988.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Number 88-0567-C(3)

James W. Chambers,
Petitioner,

vs.

Bill Armontrout,
Respondent.

SECOND AMENDED PETITION IN HABEAS CORPUS

Comes now Petitioner, JAMES W. CHAMBERS, and for his Second Amended Petition under 28 U.S.C. §2255, states to the Court as follows:

1. Petitioner hereby realleges and readopts the allegations contained in Paragraphs 1 through 11 of Petitioner's Pro Se Petition filed herein on March 23, 1988.

2. In Petitioner's proceeding under Missouri Supreme Court Rule 27.26, Petition raised the following grounds:

a. Petitioner was denied the effective assistance of counsel under the Sixth Amendment, because Petitioner's trial counsel failed to interview or call, as witnesses, Donald Chapman, James Jones, Eleanor Hotchkiss, and Jackie Turner. Chapman and Jones would have testified that the victim knocked Petitioner to the ground immediately before Petitioner shot the victim. Hotchkiss and Turner would have testified that Petitioner did not go to the Country Club Lounge intending to kill the victim.

b. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment, because Petitioner's trial

counsel failed to interview witnesses who were at an eye-doctor's office, wherein Petitioner allegedly made statements admitting that he killed the victim. These witnesses would have testified that they never heard Petitioner make such a statement.

c. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment, because Petitioner's trial counsel failed to procure, as evidence, Petitioner's clothing which would have refuted State's theory of the shooting.

d. Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments because members of the Arnold Police and Jefferson County Sheriff's Department threatened and harassed witnesses who would have testified on Petitioner's behalf, thereby inducing them not to testify.

e. Members of the Arnold Police Department deliberately kept from Petitioner's counsel a needle-nosed, red-handled pliers, which was an important element of Petitioner's trial defense.

3. Petitioner is being unlawfully held for the following reasons:

a. Petitioner was denied his right to the effective assistance of counsel under the Sixth Amendment because Petitioner's trial counsel failed to interview, as potential witnesses, Donald Chapman, James Jones, and Eleanor Hotchkiss. Donald Chapman would have refuted all major contentions of the State's theory of the case. He would have testified that he and Petitioner and Eleanor Hotchkiss drove to the Country Club Lounge in Arnold, Missouri, on May 29, 1982, in order to borrow equipment so that they could continue fishing at night. He would further have testified that the victim followed Petitioner out of the Country Club Lounge, hit him in the face and knocked him to the ground, after which Petitioner shot the victim. Chapman drove the car in which Petitioner was riding on that

night and was sitting in the car, outside the Country Club Lounge, when the shooting occurred. James Jones would have testified that Petitioner walked out of the Country Club Lounge, followed by the victim, who then hit Petitioner, Petitioner shot him. Jones was sitting in his car in the parking lot of the Country Club Lounge at the time. Eleanor Hotchkiss would have testified that, to her knowledge, they were just going to the Country Club Lounge to get fishing equipment. She also rode in the car, with Petitioner and Chapman, to the Country Club Lounge, at the time of the shooting.

All three of these witnesses would have directly refuted the State's theory of capital murder, which was that Petitioner drove to the Country Club Lounge intending to kill the victim. The State's theory was further that when Petitioner and the victim walked out of the bar, Petitioner struck the victim in the face with his gun and then shot him. Petitioner's trial counsel's failure to interview these witnesses was not supported by reasonable professional judgment. Petitioner's trial counsel called no witnesses on Petitioner's behalf, at Petitioner's trial. Petitioner's trial counsel knew how to contact these three witnesses and chose not to contact them. If these witnesses had testified, Petitioner could have been acquitted on a theory of self-defense, or could have been convicted of a lesser offense than capital murder.

b. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment because Petitioner's trial counsel failed to attempt to locate or to attempt to interview potential witnesses at an eye-doctor's office where Petitioner allegedly made incriminating admissions. Deputy Eugene Kentch testified at Petitioner's trial that Petitioner made statements to the people in the waiting room of an eye-doctor's office to the effect that Petitioner had killed one of their friends and that he would kill two police officers if he would get a gun.

Petitioner's trial counsel only talked to employees of the Sheriff's Department about the incident. He did not attempt to

locate or interview any of the patients who were at the eye-doctor's office at the time these statements were allegedly made. These patients would have testified that they did not hear Petitioner make these statements. This testimony would have impeached the credibility of a Sheriff's Deputy involved in the case, and would have injected doubt into the credibility of all State's witnesses. This doubt would or could have changed the verdict in the case.

c. At Petitioner's trial, there was sufficient evidence in the record to warrant submission of Petitioner's proffered self-defense instruction. The trial court refused to submit Petitioner's self-defense instruction, and in so doing, denied Petitioner his right to a fair trial under the Fifth and Fourteenth Amendments.

The evidence at Petitioner's trial was that the victim was involved in a loud argument before Petitioner arrived, that the victim was "crazy drunk . . . wanting to fight like crazy . . . trying to get a fight going with anybody he could." The evidence was further that the victim's blood alcohol level was .14 even after being given fresh blood subsequent to the shooting, that the victim followed Petitioner out the door, turned toward Petitioner, and that no one then saw the victim or the Petitioner for the next ten seconds. A pair of needle-nosed pliers were found next to where the victim fell. The testimony was further that the victim started toward Petitioner and that's when the shot was fired. Petitioner is between 5'6" and 5'8" in height, weighing approximately 160 pounds. The victim was approximately 6' tall, and weighed approximately 200 pounds.

Based on this evidence, whether or not the Petitioner could have shot the victim in self-defense should have been a question for the jury. If the trial court had instructed the jury on the issue of self-defense, the jury could have found the Petitioner not guilty, or could have found him guilty of a lesser charge than capital murder.

d. The Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments, because his Motion for Change of Venue was denied. Prior to Petitioner's second trial for this offense, in May, 1985, there was extensive publicity in Jefferson County Newspapers dealing with the fact that Petitioner had already been convicted onece for this same offense, and had his conviction overturned. Prior to Petitioner's second trial, twenty-one newspaper articles appeared in Jefferson County regarding Petitioner and the shooting herein. These articles appeared in five different newspapers over a three year period. Petitioner's name appeared in the headlines in Jefferson County newspapers at least fifteen times, and Petitioner's name was in the headlines on page 1 at least five times prior to trial. Nineteen of the twenty-one newspaper articles referred to the fact that Petitioner had already been tried and convicted of murder, and sentenced to death.

In view of this barrage of damaging pre-trial publicity, Petitioner's Motion for Change of Venue should have been granted.

4. Petitioner hereby readopts and realleges each and every allegation contained in Paragraphs 13 through 17 of Petitioner's Pro Se Petition filed herein on March 23, 1988.

WHEREFORE, Petitioner prays that this Court vacate the Sentence and Judgment entered by the Circuit Court of Jefferson County, which Sentence and Judgment was entered June 10, 1985, in *State of Missouri v. James W. Chambers,* and that this Court grant Petitioner whatever other relief to which Petitioner may be entitled in this proceeding.

Respectfully submitted,

SPALDING, WESTHUS &
MEYER, P.C.

By: Thomas R. Schlesinger #33494
Attorneys for Petitioner
400 Chesterfield Center
Suite 220
Chesterfield, Missouri 63017
532-6100

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 23rd day of June, 1988, to: PATRICK L. KING, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

/s/ Thomas R. Schlesinger

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

Number 88-0567-C-3

James W. Chambers,
Petitioner,

vs.

Bill Armontrout,
Respondent.

AMENDED PETITION IN HABEAS CORPUS

Comes now Petitioner, JAMES W. CHAMBERS, and for his Amended Petition under 28 U.S.C. §2255, states to the Court as follows:

1. Petitioner hereby realleges and readopts the allegations contained in Paragraphs 1 through 11 of the Petition previously filed herein.

2. In Petitioner's proceeding under Missouri Supreme Court Rule 27.26, Petitioner raised the following grounds:

a. Petitioner was denied the effective assistance of counsel under the Sixth Amendment, because Petitioner's trial counsel failed to interview or call, as witnesses, Donald Chapman, James Jones, Eleanor Hodgkiss, and Jackie Turner. Chapman and Jones would have testified that the victim knocked Petitioner to the ground immediately before Petitioner shot the victim. Hodgkiss and Turner would have testified that Petitioner did not go to the Country Club Lounge intending to kill the victim.

b. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment, because Petitioner's trial

court failed to interview witnesses who were at an eye-doctor's office, wherein Petitioner allegedly made statements admitting that he killed the victim. These witnesses would have testified that they never heard Petitioner make such a statement.

c. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment, because Petitioner's trial counsel failed to procure, as evidence, Petitioner's clothing which would have refuted State's theory of the shooting.

d. Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments because members of the Arnold Police and Jefferson County Sheriff's Department threatened and harassed witnesses who would have testified on Petitioner's behalf, thereby inducing them not to testify.

e. Members of the Arnold Police Department deliberately kept from Petitioner's counsel a needle-nosed, red-handled pliers, which was an important element of Petitioner's trial defense.

3. Petitioner is being unlawfully held for the following reasons:

a. Petitioner was denied his right to the effective assistance of counsel under the Sixth Amendment because Petitioner's trial counsel failed to interview, as potential witnesses, Donald Chapman, James Jones, and Eleanor Hodgkiss. Donald Chapman would have refuted all major contentions of the State's theory of the case. He would have testified that he and Petitioner and Eleanor Hodgkiss drove to the Country Club Lounge in Arnold, Missouri, on May 29, 1982, in order to borrow equipment so that they could continue fishing at night. He would furthur have testified that the victim followed Petitioner out of the Country Club Lounge, hit him in the face and knocked him to the ground, after which Petitioner shot the victim. Chapman drove the car in which Petitioner was riding on that night and was sitting in the car, outside the Country Club

Lounge, when the shooting occurred. James Jones would have testified that Petitioner walked out of the Country Club Lounge, followed by the victim, who then hit Petitioner in the face and knocked him to the ground. As the victim moved toward Petitioner, Petitioner shot him. Jones was sitting in his car in the parking lot of the Country Club Lounge at the time. Eleanor Hodgkiss would have testified that, to her knowledge, they were just going to the Country Club Lounge to get fishing equipment. She also rode in the car, with Petitioner and Chapman, to the Country Club Lounge, at the time of the shooting.

All three of these witnesses would have directly refuted the State's theory of capital murder, which was that Petitioner drove to the Country Club Lounge intending to kill the victim. The State's theory was further that when Petitioner and the victim walked out of the bar, Petitioner struck the victim in the face with his gun and then shot him. Petitioner's trial counsel's failure to interview these witnesses was not supported by reasonable professional judgment. Petitioner's trial counsel called no witnesses on Petitioner's behalf, at Petitioner's trial. Petitioner's trial counsel knew how to contact these three witnesses and chose not to contact them. If these witnesses had testified, Petitioner could have been acquitted on a theory of self-defense, or could have been convicted of a lesser offense than capital murder.

b. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment because Petitioner's trial counsel failed to attempt to locate or to attempt to interview potential witnesses at an eye-doctor's office where Petitioner allegedly made incriminating admissions. Deputy Eugene Kentch testified at Petitioner's trial that Petitioner made statements to the people in the waiting room of an eye-doctor's office to the effect that Petitioner had killed one of their friends and that he would kill two police officers if he would get a gun.

Petitioner's trial counsel only talked to employees of the Sheriff's Department about the incident. He did not attempt to

locate or interview any of the patients who were at the eye-doctor's office at the time these statements were allegedly made. These patients would have testified that they did not hear Petitioner make these statements. This testimony would have impeached the credibility of a Sheriff's Deputy involved in the case, and would have injected doubt into the credibility of all State's witnesses. This doubt would or could have changed the verdict in the case.

c. Petitioner was denied his right to effective assistance of counsel under the Sixth Amendment because Petitioner's trial counsel failed to procure and to use, as evidence, Petitioner's t-shirt and blue jeans, as well as the victims clothes, which were in the custody of the Arnold Police. The State's case rested largely on the idea that Petitioner was five to ten feet away from the victim when he shot him. By examining the powder burns on the victim's clothing and Petitioner's clothing, Petitioner's trial counsel could have proven that the victim was only a couple feet away from Petitioner when Petitioner fired the shot. In addition, Petitioner's trial counsel failed to procure a needle-nosed pliers which Defendant told him had been used as a weapon by the victim. This would have supported Petitioner's theory of self-defense and would have allowed the jury to reach a different verdict.

d. Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments because the Arnold Police threatened and harassed his potential witnesses to such an extent that they were afraid to testify on is behalf. Members of the Arnold Police Department told Eleanor Hodgkiss that they would "gas" her boyfriend, Donald Chapman, if she testified on Petitioner's behalf. She would have testified that Petitioner was going to the Country Club Lounge for the purpose of obtaining fishing equipment.

Police arrested Donald Chapman in connection with the shooting and held him for thirty days thereafter. He was then released and charges against him were dropped. However, he

was told by members of the Arnold Police, that if he testified on behalf of Petitioner, the charges against him would be reinstated and he would be executed.

Chapman and Hodgkiss would have testified as hereinabove mentioned. Their testimony was crucial to Petitioner's defense and directly refuted all key elements of the State's case. No witnesses were called to testify on behalf of Petitioner at his trial. If Chapman and Hodgkiss had testified, Petitioner would have been acquitted or convicted of a lesser charge than capital murder.

e. Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments because members of the Arnold Police deliberately lost or hid a pair of red-handled, needle-nosed pliers, which were crucial to the defense of Petitioner. Petitioner had evidence to indicate that the victim was holding this pair of pliers when he walked out of the Country Club Lounge, following the Petitioner. After knocking Petitioner to the ground, the victim then tried to stab Petitioner with the pliers, after which Petitioner shot the victim. Petitioner and Petitioner's trial counsel were unable to examine the pliers prior to trial because the police allegedly lost them.

At trial, Kenneth Vaughn testified that the pliers were his and that he had dropped them by the victim's body, accidentally, after the shooting. If Petitioner and Petitioner's trial counsel had access to the pliers, they could have proven that the victim had the pliers at the time of the shooting. This would have supported Petitioner's theory of self-defense and would have allowed the jury to acquit Petitioner or convict him of a lesser charge than capital murder.

f. At Petitioner's trial, there was sufficient evidence in the record to warrant submission of Petitioner's proffered self-defense instruction. The trial court refused to submit Petitioner's self-defense instruction, and in so doing, denied Petitioner his right to a fair trial under the Fifth and Fourteenth Amendments.

The evidence at Petitioner's trial was that the victim was involved in a loud argument before Petitioner arrived, that the victim was "crazy drunk . . . wanting to fight like crazy . . . trying to get a fight going with anybody he could." The evidence was further that the victim's blood alcohol level was .14 even after being given fresh blood subsequent to the shooting, that the victim followed Petitioner out the door, turned toward Petitioner, and that no one then saw the victim or the Petitioner for the next ten seconds. A pair of needle-nosed pliers were found next to where the victim fell. The testimony was further that the victim started toward Petitioner and that's when the shot was fired. Petitioner is between 5'6" and 5'8" in height, weighing approximately 160 pounds. The victim was approximately 6' tall, and weighed approximately 200 pounds.

Based on this evidence, whether or not the Petitioner could have shot the victim in self-defense should have been a question for the jury. If the trial court had instructed the jury on the issue of self-defense, the jury could have found the Petitioner not guilty, or could have found him guilty of a lesser charge than capital murder.

g. The Petitioner was denied his right to a fair trial under the Fifth and Fourteenth Amendments, because his Motion for Change of Venue was denied. Prior to Petitioner's second trial for this offense, in May, 1985, there was extensive publicity in Jefferson County Newspapers dealing with the fact that Petitioner had already been convicted once for this same offense, and had his conviction overturned. Prior to Petitioner's second trial, twenty-one newspaper articles appeared in Jefferson County regarding Petitioner and the shooting herein. These articles appeared in five different newspapers over a three year period. Petitioner's name appeared in the headlines in Jefferson County newspapers at least fifteen times, and Petitioner's name was in the headlines on page 1 at least five times prior to trial. Nineteen of the twenty-one newspaper articles referred to the fact that Petitioner had already been tried and convicted of murder, and sentenced to death.

In view of this barrage of damaging pre-trial publicity, Petitioner's Motion for Change of Venue should have been granted.

4. Petitioner hereby readopts and realleges each and every allegation contained in Paragraphs 13 through 17 of the Petition previously filed herein.

WHEREFORE, Petitioner prays that this Court grant Petitioner a hearing in this case, and after said hearing, that this Court grant Petitioner the relief to which Petitioner may be entitled in this proceeding.

Respectfully submitted,

/s/ Thomas R. Schlesinger #33494
Attorney for Petitioner
400 Chesterfield Center
Suite 220
Chesterfield, Missouri 63017
532-6100

I declare under penalty of perjury that the foregoing is true and correct. Executed on this ____ day of ____, 1988.

James W. Chambers

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 6th day of April, 1988, to: PATRICK L. KING, Assistant Attorney General, Post Office Box 899, Jefferson City, Missouri 65102.

/s/ Thomas R. Schlesinger

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI
_____ DIVISION

PERSONS IN STATE CUSTODY APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. SECTION 2254

Name: JOHN CHAMBERS

Prison Number: C.P. 22

Place of Confinement: main prison at Jefferson City, Mo. (Box 900) 65201

United States District Court EASTERN District of MISSOURI

Case No.: 88-0567-C-3

JAMES CHAMBERS PETITIONER

v.

BILL ARMONTROUT RESPONDENT
and
THE ATTORNEY GENERAL OF THE STATE OF MISSOURI
_____ADDITIONAL RESPONDENT.

(If petitioner is attacked a judgment which imposed a sentence to be served in the *future*, petitioner must fill in the name of the state where the judgment was entered. If petitioner has a sentence to be served in the *future* under a federal judgment which he wishes to attack, petitioner should file a motion under 28 U.S.C. Section 2255, in the federal court which entered the judgment.)

Instructions - Read Carefully

(1) This petition must be legibly handwritten or typewritten, and signed by the petitioner under penalty of perjury. Any false statement of a material fact may serve as a basis for prosecution and conviction for perjury. All questions

must be answered concisely in the proper space on the form.

(2) Additional pages are not permitted except with respect to the *facts* which you rely upon to support your grounds for relief. No citation of authorizaties need be furnished. If briefs or arguments are submitted, they should be submitted in the form of a separate memorandum.

(3) Upon receipt of a fee of $5 your petition will be filed if it is in proper order.

(4) If you do not have the necessary filing fee you may request permission to proceed in forma pauperis, in which event you must execute the declaration on the last page, setting forth information estaolishing your inability to prepay the fees and costs or give security therefor. If you wish to proceed in forma pauperis, you must have an authorized officer at the penal institution complete the certificate as to the amount of money and securities on deposit to your credit in any account in the institution.

(5) Only judgments entered by one court may be challenged in a single petition. If you seek to challenge judgments entered by different courts either in the same state or in different states, you must file separate petitions as to each court.

(6) Your attention is directed to the fact that you must include all grounds for relief and all facts supporting such grounds for relief in the petition you file seeking relief from any judgment of conviction.

(7) When the petition is fully completed, the *original and two copies* must be mailed to the Clerk of the United States District Court whose address is 1114 Market St., St. Louis, Missouri 63101.

(8) Petitions which do not conform to these instructions will be returned with a notation as to the deficiency.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
_____ DIVISION

PETITION

1. Name and location of court which entered the judgment of conviction under attack: Circuit Court of Jefferson County, Mo. at Hillsboro, Mo.

2. Date of judgment of conviction: June 20th, 1985.

3. Length of Service: DEATH.

4. Nature of offense involved (all counts): Capital murder.

5. What was your plea? (Check one)

   (a) Not Guilty ____YES____

   (b) Guilty _____

   (c) Nolo Contendere _____

If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: N/A

6. Kind of trial: (Check One) (a) Jury XX
   (b) Judge only _____

7. Did you testify at the trial? Yes [ ] No [XX]

8. Did you appeal from the judgment of conviction?
   Yes [XXX] No [ ]

9. If you did appeal, answer the following:

   (a) Name of court: Mo. S. Ct.

   (b) Result: denied

   (c) Date of result: June 15th, 1986

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, Rule 27.26 motions or other motions with respect to this judgment in any court, state or federal? Yes [XXX] No [ ]

11. If your answer to 10 was "yes", give the following information:

(a) (1) Name of court: Circuit Court Jefferson County, Mo.

(2) Nature of proceeding: Mo. S. Ct. Rule 27.26

(3) Grounds raised: See attached sheets (Movant has copied the points relied on from the brief filed in the Mo. App. court in the appeal of the Circuit Court's denial of the Rule 27.26 thus avoiding any claim that Movant is not presenting the same claims.

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes[XX] No [ ]

(5) Result: denied

(6) Date of result: December 22nd, 1987

(b) As to any second petition, application or motion give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: _____

(3) Grounds raised: _____

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [ ]

(5) Result: N/A

(6) Date of result: _____

(c) As to any third petition, application or motion, give the same information:

(1) Name of court: N/A

(2) Nature of proceeding: _____

(3) Grounds raised: N/A

(4) Did you receive an evidentiary hearing on your petition, application, or motion? Yes [ ] No [ ]

(5) Result: N/A

(6) Date of result:_____

(d) Did you appeal to the highest state court having jurisdiction the result of action taken on any petition, application or motion?

(1) First petition, etc. Yes [XXX] No [ ]

(2) Second petition, etc. Yes [ ] No [ ] N/A

(3) Third petition, etc. Yes [ ] No [ ] N/A

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain why you did not: N/A

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the facts supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

CAUTION: In order to proceed in the federal court, you must ordinarily first exhaust your state court remedies as to each ground on which you request action by the federal court. If you

fail to set forth all grounds in this petition, you may be barred from presenting additional grounds at a later date.

For your information, the following is a list of the most frequently raised grounds for relief in habeas corpus proceedings. Each statement preceded by a letter constitutes a separate ground for possible relief. You may raise any grounds which you may have other than those listed if you have exhausted your state court remedies with respect to them. However, *you should raise in this petition all available grounds* (relating to this conviction) on whichyou based your allegations that you are being held in custody unlawfully.

Do not check any of these listed grounds. If you select one or more of these grounds for relief, you must allege facts. The petition will be returned to you if you merely check (a) through (j) or any one of the grounds.

(a) Conviction obtained by plea of guilty which was unlawfully induced or not made voluntarily with understanding of the nature of the charge and the consequences of the plea.

(b) Conviction obtained by use of coerced confession.

(c) Conviction obtained by use of evidence gained pursuant to an unconstitutional search or seizure.

(d) Conviction obtained by use of evidence obtained pursuant to an unlawful arrest.

(e) Conviction obtained by a violation of the privilege against self-incrimination.

(f) Conviction obtained by the unconstitutional failure of the prosecution to disclose to the defendant evidence favorable to the defendant.

(g) Conviction obtained by a violation of the protection against double jeopardy.

(h) Conviction obtained by action of a grand or petit jury which was unconstitutionally selected and impanelled.

(i) Denial of effective assistance of counsel.

(j) Denial of right of appeal.

A. Ground one: see attached sheets

Supporting FACTS (tell your story *briefly* without citing cases or law): Movant has copied each of the points relied on from the direct appeal and the post conviction appeal and included same herein as the points relief on in this Court and thus grounds for the to issue the great writ. This will avoid any claim by the Respondent that Movant is not presenting the same claims. Counsel will provide the arguments and authorities relied upon.

B. Ground two: _____

Supporting FACTS (tell your story *briefly* without citing cases or law): _____

POINTS RELIED ON

I

THE TRIAL COURT ERRED IN REFUSING TO GIVE INSTRUCTION NO. A, DEFENDANT'S SELF-DEFENSE INSTRUCTION, BECAUSE THERE WAS SUFFICIENT EVIDENCE IN THE RECORD TO WARRANT SUBMISSION OF THIS INSTRUCTION AND, BY REFUSING, THE TRIAL COURT FAILED TO INSTRUCT THE JURY ON THE WHOLE LAW OF THE CASE.

State v. Chambers, 671 S.W.2d 781 (Mo. banc 1984);

State v. Rash, 359 Mo. 215, 221 S.W.2d 124 (1949);

State v. Hicks, 438 S.W.2d 215 (Mo. 1969);

State v. Wilson, 645 S.W.2d 372 (Mo. 1983);

State v. McGowan, 621 S.W.2d 557 (Mo. App. 1981);

State v. Jackson, 522 S.W.2d 317 (Mo. App. 1975).

II

THE TRIAL COURT ERRED IN DENYING APPELLANT'S SECOND MOTION FOR CHANGE OF VENUE, BECAUSE THE INHABITANTS OF JEFFERSON COUNTY WERE PREJUDICED AGAINST APPELLANT DUE TO EXTENSIVE PRETRIAL PUBLICITY REGARDING HIS PRIOR CONVICTION FOR THE SAME OFFENSE, THEREBY DENYING APPELLANT HIS RIGHT TO A FAIR TRIAL UNDER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Sheppard v. Maxwell, 384 U.S. 333 (1966);

Irvin v. Dowd, 366 U.S. 717 '1961);

Forsythe v. State, 230 N.E.2d 681 (C.P. of Allen County 1967);

State v. Boggs, 634 S.W.2d 447 (Mo. banc 1982);

State v. Hayes, 624 S.W.2d 16 (Mo. 1981);

State v. Molasky, 655 S.W.2d 663 (Mo. App. 1983), *cert. denied*, 464 U.S. 1049 (1984);

Maine v. Superior Court, 68 Cal.2d 375, 438 P.2d 372 (Cal. banc 1968);

Bainszewski v. State, 261 N.E.2d 359 (Ind. 1970);

People v. Tidwell, 3 Cal.3d 62, 473 P.2d 748 (Cal. banc 1970).

III

THE TRIAL COURT ERRED IN OVERRRULING DEFENDANT'S OBJECTIONS TO THE EXCUSAL, FOR CAUSE, OF VENIREMEN BETALLE AND GERLEMAN, BECAUSE THEIR EXCUSAL FROM SITTING AS JUROR IN THE GUILT PHASE OF APPELLANT'S TRIAL:

A) - RESULTED IN A JURY WHICH WAS MORE CONVICTION PRONE, THEREBY DEPRIVING APPELLANT OF A FAIR AND IMPARTIAL JURY AND A JURY REPRESENTATIVE OF FAIR CROSS SECTION OF THE COMMUNITY IN VIOLATION OF HIS RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION IN THAT

1) JURORS WHO COULD IMPARTIALLY TRY THE ISSUE OF GUILT OR INNOCENCE BUT COULD NOT ASSESS THE DEATH PENALTY ARE A CONSTITUTIONALLY SIGNIFICANT SEGMENT OF THE POPULATION;

2) "SCRUPLED" VENIREMEN WERE REMOVED FROM THE PANEL AND THE REMAINING VENIREMEN WERE PREJUDICED BY THE QUALIFICATION PROCEDURE; AND

B) WAS IN VIOLATION OF ART. I, SEC. 5 OF THE MISSOURI CONSTITUTION AND SEC. 546.130 RSMo 1978, IN THAT THEY WERE DISQUALIFIED FROM JURY SERVICE DUE TO THEIR VIEWS ON THE DEATH PENALTY, WHICH WERE OR MAY HAVE BEEN RELIGIOUS IN BASIS.

Keeten v. Garrison, 578 F. Supp. 1164 (W.D. N.C. 1984); *rev'd*, 742 F.2d 129 4th Cir. 1984);

Grigsby v. Mabry, 569 F. Supp. 1273 (E.D. Ark. 1983), *aff'd*, 758 F.2d 226 (8th Cir. 1985); *cert. granted sub nom. Lockhart v. McCree*, 106 S.Ct. 59 (1985);

Witherspoon v. Illinois, 391 U.S. 510 (1968);

State v. Lashley, 667 S.W.2d 712 (Mo. banc 1984); *cert. denied*, ____ U.S. ____, 105 S.Ct. 229 (1984);

Duren v. Missouri, 439 U.S. 357 (1979);

Ballew v. Georgia, 435 U.S. 223 (1978);

Taylor v. Louisiana, 419 U.S. 522 (1975);

Peters v. Kiff, 407 U.S. 493 (1972);

Hovey v. Superior Court of Alameda County, 28 Cal.3d 1, 168 Cal. Rptr. 128, 616 P2d 1301 (1980);

State v. Kenley, 693 S.W.2d 79 (Mo. banc 1985);

State v. Johns, 780 S.W.2d 253 (Mo. band 1984);

Rodgers v. Danforth, 486 S.W.2d 258 (Mo. banc 1972);

Wainwright v. Witt, _____ U.S. _____, 105 S.Ct. 844 (1985);

State v. Nave, 694 S.W.2d 729 (Mo. banc 1985);

State v. Jones, No. 66697 (Mo. banc 1985);

Bounds v. Smith, 430 U.S. 817 (1977);

Estelle v. Williams, 425 U.S. 501 (1976), *reh'g denied*, 426 U.S. 954 (1976);

Castaneda v. Partida, 430 U.S. 482 (1976);

Schowgurow v. State, 420 Md. 121, 213 A.2d 475 (1965);

State v. Madison, 240 Md. 265, 213 A.2d 880 (1965);

Labat v. Bennet, 365 F.2d 698 (5th Cir. 1966), *cert. denied*, 386 U.S. 991 (1967);

Simmons v. State, 182 So.2d 442 (Fla. Ct. App. 1966);

People v. Attica Brothers, 79 Misc.2d 492, 359 N.Y.S.2d 699 (N.Y. Sup. Ct. 1974);

United States v. Butera, 420 F.2d 564 (1st Cir. 1970);

U.S. Const., amend. V;

U. S. Const., amend VI;

U.S. Const., amend XIV;

Mo. Const., Art. I, sec. 5;

Section 546.130, RSMo 1978;

C. Haney, *On the Selection of Capital Juries: The Biasing Effects of the Death Qualification Process*, 8 LAW & hum. behav. 121 (1984); and

B. Winick, *Prosecutorial Peremptory Challenge Practices in Capital Cases: An Empirical Study and a Constitutional Analysis*, 81 MICH. L. REV. 1, 57 (1982).

IV

THE TRIAL COURT ERRED IN NOT PERMITTING APPELLANT, IN HIS ARGUMENT TO THE JURY, TO DRAW AN ADVERSE INFERENCE FROM THE STATE'S FAILURE TO CALL A WITNESS WHO WAS CLOSELY CONNECTED WITH THE STATE AND, THEREFORE, WAS NOT EQUALLY AVAILABLE TO BOTH PARTIES.

State v. Farrell, 682 S.W.2d 118 (Mo. App. 1984);

State v. Moore, 620 S.W.2d 370 (Mo. banc 1981);

State v. Wilkerson, 559 S.W.2d 228 (Mo. App. 1977);

State v. Beasley, 182 S.W.2d 541, 353 Mo. 392 (1944).

POINTS RELIED ON

I.

THE HEARING COURT WAS CLEARLY ERRONEOUS IN OVERRULING APPELLANT'S TRIAL COUNSEL TO INTERVIEW WITNESSES JAMES JONES AND DONALD CHAPMAN WAS NOT SUPPORTED BY REASONABLE PROFESSIONAL JUDGMENT AND THEREBY DENIED APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

Poole v. State, 671 S.W.2d 787 (Mo. App. 1983);

Wilson v. Cowan, 578 F.2d 166 (6th Cir. 1978);

Nealy v. Cabana, 764 F.2d 1173 (5th Cir. 1985);

Strickland v. Washington, 466 U.S. 668 (1984);

Seales v. State, 580 S.W.2d 733 (Mo. banc 1979);

Hanch v. K.F.C. National Management Corporation, 618 S.W.2d 28 (Mo. banc 1981);

Davis v. Alabama, 596 F.2d 1214 (5th Cir. 1979);

Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986);

Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983);

Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986);

Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972);

U.S. v. Dingle, 546 F.2d 1378 (10th Cir. 1976);

Bell v. Georgia, 554 F.2d 1360 (5th Cir. 1977);

House v. Balkcom, 725 F.2d 608 (11th Cir. 1984);

State ex rel Casey v. Wolff, 727 F.2d 658 (7th Cir. 1984);

U.S. v. Moore, 554 F.2d 1086 (D.C. Cir. 1976);

Crisp v. Duckworth, 743 F.2d 580 (7th Cir. 1984);

Ladd v. State, 621 S.W.2d 543 (Mo. App. 1981);

Ladd v. Hopper, 621 S.W.2d 543 (Mo. App. 1981);

Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978);

State v. Chambers, 714 S.W.2d 527 (Mo. banc 1986).

II.

THE HEARING COURT WAS CLEARLY ERRONEOUS IN OVERRULING APPELLANT'S MOTION UNDER RULE 27.26, BECAUSE THE FAILURE OF APPELLANT'S TRIAL COUNSEL TO ATTEMPT TO LOCATE AND INTERVIEW WITNESSES FROM THE EYE-DOCTOR'S OFFICE WAS NOT SUPPORTED BY REASONABLE PROFESSIONAL JUDGMENT AND, WHEN COUPLED WITH COUNSEL'S OTHER ERRORS, DENIED APPELLANT HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT.

Trimble v. State, 693 S.W.2d 267 (Mo. App. 1985);

Poole v. State, supra;

Eldridge v. Atkins, 665 F.2d 228 (8th Cir. 1981);

Strickland v. Washington, supra,

Wilson v. Cowan, supra.

C. Ground three: _____
Supporting FACTS (tell your story *briefly* without citing cases or law): _____

13. If any of the grounds listed in 12A, B, C, and D were not previously presented in any other court, state or federal, state *briefly* what grounds were not so presented, and give your reasons for not presenting them: N/A

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes [ ] No [XX]

15. Give the name and address, if known, of each attorney who represented you in the following states of the judgment attacked herein:

    (a) At preliminary hearing Donal Haggar, Public Defender, Hillsboro, Mo.

    (b) At arraignment and plea Haggar

    (c) At trial Haggar

    (d) At sentencing Haggar

    (e) On appeal Tomas R. Schlessinger, 317 N. 11th St., Suite 1111, St. Louis, Missouri 63101

    (f) In any post-conviction proceeding Schlessinger

    (g) On appeal from any adverse ruling in a post-conviction proceeding. Schlessinger

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at approximately the same time? Yes [ ] No [XX]

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes [ ] No [XX]

    (a) If so, give name and location of court which imposed sentence to be served in the future: N/A

    (b) And give date and lenth of sentence to be served in the future: N/A

    (c) Have you filed, or do you contemplate filing, any petition attacking the judgment which imposed the sentence to be served in the future? Yes [ ] No [ ] N/A

Wherefore, petitioner prays that the Court grant petitioner relief to which petitioner may be entitled in this proceeding.

/s/ James W. Chambers

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on 18th, March, 1988.

/s/ James W. Chambers

APPENDIX I

James W. CHAMBERS, Appellant,

v.

STATE of Missouri, Respondent.

No. 52910

Missouri Court of Appeals,
Eastern District,
Division Two.

Dec. 22, 1987.

Motion for Rehearing and/or Transfer
Denied Feb. 4, 1988.

Application to Transfer Denied
March 15, 1988.

Appeal was taken from order of the Circuit Court, Jefferson County, John L. Anderson, J., which denied postconviction motion. The Court of Appeals, Dowd, J., held that defendant did not receive ineffective assistance of counsel.

Affirmed.

Thomas R. Schlesinger, Chesterfield, for appellant.

William L. Webster, Atty. Gen., Jared R. Cone, Asst. Atty., Jefferson City, for respondent.

DOWD, Judge.

Movant James W. Chambers appeals after the denial of his Rule 27.26 motion following an evidentiary hearing. We affirm.

Appellant was convicted of capital murder for which he was sentenced to death. On direct appeal following his original trial, the Missouri Supreme Court reversed appellant's conviction and

ordered a new trial on grounds the trial court refused appellant's tendered self-defense instruction when there was sufficient evidence of self-defense to warrant submission of the issue to the jury. *State v. Chambers*, 671 S.W.2d 781 (Mo. banc 1984) [hereinafter cited as *Chambers I*].

On retrial, appellant did not adduce the evidence of self-defense presented in the first trial. Accordingly, the trial court refused appellant's tendered instruction on self-defense. Appellant was again convicted of capital murder and sentenced to death. On direct appeal, the Missouri Supreme Court upheld appellant's conviction concluding the evidence presented at appellant's second trial did not justify a self-defense instruction. *State v. Chambers*, 714 S.W.2d 527 (Mo. banc 1986) [hereinafter cited as *Chambers II*].

In his motion seeking relief under Rule 27.26, appellant contends he was denied effective assistance of counsel in that counsel who represented appellant during his second trial failed to interview and call crucial witnesses who could have testified in appellant's behalf.

A full statement of the facts surrounding appellant's conviction is given in the opinion on direct appeal. *Chambers II, supra*. In brief, the evidence showed appellant went to a lounge in Arnold, Missouri and sought out the victim. Appellant initiated an argument with the victim and coaxed the victim to settle the matter outside of the establishment. Appellant departed the establishment first and drew a handgun on his way out. As the unarmed victim exited the lounge, appellant struck the victim over the head with the gun. The victim rose to his feet with his hands in the air. Appellant fired a single shot into the victim's chest. Appellant then proceeded to pistol whip the victim, dragged the victim across the parking lot, and taunted him. Thereafter, appellant ran to the passenger side of an awaiting automobile and fled the scene. Following the incident, a pair of needle-nosed pliers was found lying next to the victim's body.

The owner of the lounge, however, testified the pliers were his and had dropped from his pocket after the incident when he reached for a handkerchief while standing over the victim's body.

The State's theory of the case under the capital murder submission was that appellant intended to cause the death of the victim and reflected upon the matter cooly and fully before doing so in that appellant sought out the victim, appellant drew a handgun and waited for the unarmed victim to exit the establishment, and appellant had a getaway car waiting so that he could quickly flee the scene.

At the 27.26 motion hearing, appellant's counsel from his second trial testified it was his trial strategy to undermine the credibility of the state's witnesses and to suggest the victim had a pair of needle-nosed pliers in hand at the time of the incident in order to get a self-defense instruction.

At appellant's first trial, a witness, Jim Jones, was called to testify in appellant's defense. Jones was not called to testify at appellant's second trial. It was this witness' testimony that was central to the Supreme Court's decision in *Chambers I*, *supra*, requiring reversal on grounds the trial court failed to instruct on self-defense where the instruction was warranted. Jones testified during the first trial that he was in the parking lot of the lounge on the night in question and witnessed the shooting. It was Jones' testimony that the victim struck appellant first, appellant fell backwards and as appellant was rising to his feet, he shot the victim.

On cross-examination, however, Jones testified to facts adverse to appellant's case. Jones substantiated the state's case that appellant had the handgun drawn before the victim exited the lounge and that the victim was unarmed. Moreover, Jones testified the victim was six feet away from appellant and was not advancing towards appellant when appellant fired the shot. Jones also testified that appellant pistol whipped the victim and

told the victim to "lay there and die." Jones' testimony also supported the state's theory of a getaway car as Jones testified the vehicle in which appellant fled the scene was waiting in the parking lot the entire time with the engine running and was parked in a position facing out towards the exit.

At the motion hearing, appellant's counsel acknowledged he did not interview Jones but did read the transcript of his testimony from the first trial. Counsel considered Jones' testimony very damaging to appellant and concluded Jones, for impeachment purposes, was locked into his testimony from the first trial. Counsel testified further that appellant was emphatic about the decision not to call Jones and signed a statement to that effect. The signed statement was introduced at the motion hearing. In that statement appellant agreed Jones should not be called as a witness and acknowledged that failure to call Jones might prevent appellant from receiving a self-defense instruction.

Donald Chapman, the driver of the vehicle in which appellant fled the scene of the crime, did not testify at either of appellant's trials. Chapman, a first cousin of appellant, was arrested in connection with the murder for driving the getaway car. Chapman gave recorded statements to the police after the incident. At the motion hearing, Chapman testified he witnessed the incident from the rear window of the automobile. It was Chapman's testimony that the victim struck appellant first, hitting appellant in the face and knocking him backwards. Appellant then jumped up, the two men struggled, and a shot went off.

Appellant's counsel acknowledged he did not interview Chapman. Counsel, however, did have transcripts of the statements Chapman made to the police. Counsel found these statements damaging and did not consider Chapman a credible witness in light of the fact he was arrested in connection with the incident.

At appellant's second trial, Deputy Sheriff Kentch testified that while appellant was in custody the deputy accompanied appellant to an appointment with an eye doctor. While in the waiting room of the doctor's office, appellant made statements the substance of which were that he had killed a man in Arnold and would kill two police officers if given the opportunity.

At the motion hearing, a patient who was at the doctor's office testified he was present when appellant was brought into the waiting room but did not hear appellant make the statements the deputy testified to. The patient acknowledged, however, that he had a hearing problem and was present in the waiting room with appellant no longer than five minutes.

At the motion hearing, appellant's former counsel testified he did not interview the employees or patients of the doctor. Counsel testified further that he was made aware of the incident by the prosecution through discovery only one week before trial. Counsel interviewed Deputy Kentch and found him credible. He spoke with appellant and appellant gave counsel the name of a deputy who was allegedly present at the doctor's office and would contradict Deputy Kentch. Counsel's preliminary investigation revealed this deputy was not present at the doctor's office with appellant and Deputy Kentch. Counsel testified he thereafter made the decision to spend the last few days before trial on other matters pertaining to appellant's defense. Counsel testified appellant had sent counsel on wild goose chases in the past and considered this another such incident. Counsel, however, did file a motion in limine to prohibit Deputy Kentch's testimony and cross-examined the deputy at trial as to why he never prepared a full report of the incident.

The motion court concluded that counsel's decision not to call Jones and Chapman was based upon trial strategy and was supported by reasonable professional judgment. As to counsel's failure to investigate witnesses who could have rebutted Deputy Kentch's testimony, the court concluded appellant

was not prejudiced as the deputy's testimony was cumulative in that appellant never denied he killed the victim and that was the substance of appellant's alleged statements. Moreover, the court concluded there was no evidence that any of the doctor's employees or patients would have contradicted the deputy's testimony.

Appellant contends on appeal the motion court was clearly erroneous in overruling appellant's 27.26 motion on grounds he was denied effective assistance of counsel by trial counsel's failure to interview witnesses Jones and Chapman and failure to locate and interview witnesses from the eye doctor's office.

[1] On appeal, our review is limited to whether the findings, conclusions, and judgment of the motion court are clearly erroneous. Rule 27.26(j). The credibility of the witnesses is for the motion court's determination and the court may reject testimony even though no contrary evidence is offered. *Richardson v. State*, 719 S.W.2d 912, 915 (Mo. App. 1986).

[2] There is a strong presumption that counsel is competent, and to establish ineffective assistance of counsel, appellant must demonstrate that his attorney failed to exercise the customary skill and diligence that a reasonably competent attorney would perform under similar circumstances and that he was prejudiced thereby. *Strickland v. Washington*, 466 U.S. 688, 105 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Martin v. State*, 712 S.W.2d 14, 16 (Mo. App. 1986).

[3] Trial counsel does have a duty "to make reasonable investigations or *to make a reasonable decision that a particular investigation is unnecessary*." *Martin, supra.* (emphasis added). A decision not to investigate "must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland, supra*, 466 U.S. at 691, 104 S.Ct. at 2066. Moreover, when a defendant gives counsel a reason to believe that pursuing certain investigations would be fruitless, failure to pursue the investigations may not later be challenged as unreasonable. *Id.*

[4,5] Further, if it is easier to dispose of an ineffectiveness claim on grounds of lack of sufficient prejudice, it is appropriate for the motion court to proceed directly to the issue of prejudice without first determining whether counsel's conduct was deficient. *Richardson, supra*, at 915-16; *Strickland, supra*, 466 U.S. 697, 104 S.Ct. at 2069. In order to satisfy the prejudice requirement, appellant must show "there is a reasonable probability that, absent the alleged error, the fact finder would have had a reasonable doubt respecting guilt." *Richardson, supra*, at 916. As to the claim that an attorney failed to adequately investigate a case, it must be shown the witnesses could have been located through reasonable investigation, would have testified if called, and that the testimony would have aided or improved defendant's position. *Franklin v. State*, 655 S.W.2d 561, 565 (Mo. App. 1983); *Simons v. State*, 719 S.W.2d 479, 480 (Mo. App. 1986).

[6] As to the failure to interview and call as witnesses Jones and Chapman, the motion court concluded counsel's actions were supported by reasonable professional judgment. Counsel had the benefit of Jones' recorded testimony from the first trial. Jones' testimony on cross-examination directly supported the State's theory of the case under the capital murder submission. In counsel's professional opinion the disadvantages of Jones' testimony outweighed the advantages. Appellant assented to this trial strategy and signed a statement attesting to his fact. Counsel felt no need to individually interview Jones as any deviation in Jones' testimony from that given at the first trial would have been subject to impeachment.

Counsel, likewise, had the benefit of transcripts of the statements Chapman made to police officers after his arrest. Counsel found these statements contradictory and damaging to appellant. Chapman would have been subject to impeachment by these statements if his testimony would have differed therefrom. Moreover, in counsel's professional judgment, Chapman would not have been a credible witness due to his ar-

rest in connection with the incident. We agree with the motion court that counsel's investigation of potential witnesses Jones and Chapman was reasonable under the circumstances and constituted deliberate trial strategy, not a failure to investigate.

[7] The trial court concluded that failure of counsel to investigate further the incident at the eye doctor's office was not sufficiently prejudicial to appellant. We agree but also conclude that reasonable professional judgment supported the limitations on counsel's investigation. With only one week left before trial, appellant sent counsel on a false lead as to the deputy appellant claimed was present during the incident. Moreover, appellant had sent counsel on similar false leads in the past. At the motion hearing, the court found appellant to be "not at all credible." By such conduct appellant gave counsel a reason to believe that pursuing the investigation would have been fruitless.

[8] Furthermore, we agree with the motion court that appellant did not satisfy the prejudice requirements as there was no evidence that any witness could have contradicted Deputy Kentch's testimony.

We conclude the findings, conclusions, and judgment of the motion court are not clearly erroneous. Judgment affirmed.

STEPHAN, P. J., and PUDLOWSKI, J., concur.

APPENDIX J

STATE of Missouri, Respondent,

v.

James Wilson CHAMBERS, Appellant.

No. 67191.

Supreme Court of Missouri,

En Banc.

July 15, 1986.

Rehearing Denied Sept. 16, 1986.

Defendant was convicted of capital murder in the Circuit Court, Jefferson County, Philip G. Hess, J., and he appealed. The Supreme Court, 671 S.W.2d 781, reversed and remanded for new trial. After conviction and death sentence, in the Circuit Court, John L. Anderson, J., defendant appealed. The Supreme Court, Billings, J., held that: (1) defendant was not entitled to self-defense instruction; (2) defendant was not entitled to change of venue due to pretrial publicity; (3) death qualification of jury was not constitutional violation; (4) refusal to permit defendant, during closing argument, to draw adverse influence from State's decision not to call police detective involved in initial crime scene investigiation was not abuse of discretion; and (5) imposition of sentence of death was appropriate under independent review factors.

Affirmed.

Blackmar, J., concurred in result and filed opinion.

Donnelly, J., dissented.

Welliver, J., dissented and filed opinion.

Thomas R. Schlesinger, St. Louis, for appellant.

William L. Webster, Atty. Gen., Victorine P. Mahon, Asst. Atty. Gen., Jefferson City, for respondent.

BILLINGS, Judge.

Defendant James Chambers was jury tried and sentenced to death for the capital murder of Jerry Lee Oestricker. We have exclusive appellate jurisdiction. Mo. Const. art. V, § 3. In this appeal, defendant assigns as error: (1) failure to instruct on self-defense; (2) denial of his motion for change of venue; (3) improper death qualification of the jury, and; (4) refusal to allow defendant to argue an adverse inference from the State's decision not to call a certain witness. We affirm.

The first point of error posited in this appeal — that the trial court erred in refusing to instruct on self-defense — was the very ground upon which this Court reversed defendant's first conviction and death sentence for the capital muder of Jerry Lee Oestricker. *See State v. Chambers*, 671 S.W.2d 781 (Mo. banc 1984). In *Chambers I*, we held that the evidence presented at defendant's trial in December of 1982 warranted a self-defense instruction.

Because defendant's tendered self-defense instruction in the present case—defendant's second trial—was refused and because the quantum and quality of evidence in this case differs from the evidence adduced at defendant's first trial for the capital murder of Jerry Lee Oestricker, we again must examine the sufficiency of the evidence in connection with the issue of self-defense—to determine whether the trial court in the present case committed reversible error in refusing to accept defendant's tendered instruction on self-defense. In conducting our review, we must consider the evidence in a light most favorable to defendant's construction of the facts. *State v. Fincher*, 655 S.W.2d 54 (Mo. App. 1983).

The chain of events which ultimately led to the slaying of Jerry Lee Oestricker began and ended at the Country Club

Lounge in Arnold, Missouri. At approximately 7:00 p.m. on May 29, 1982, Oestricker, who was playing pool and drinking, bumped into the chair of another patron of the bar, Jackie Turner. Turner was seated at a table with members of his family. Immediately after Oestricker bumped into Turner's chair, the two men began to argue. Before this verbal confrontation progressed any further, Kenneth Vaughn, the owner of the bar asked the parties involved in the argument to leave the bar. The Turner family departed, but Oestricker remained at the bar and continued to play pool.

Defendant made his first appearance that evening at the Country Club Lounge at approximately 10:00 p.m. Upon entering the bar, he asked an employee, Norma Jean Ieppert, where he could find the Turners. When Mrs. Ieppert informed defendant that the Turners had left the bar earlier in the evening, defendant immediately departed. Defendant, however, returned approximately 30 minutes later in the company of Jackie Turner.

Once inside the bar, defendant immediately approached Oestricker and asked the victim to buy him a drink. Oestricker, referring to defendant by his nickname, "Bimbo", indicated in strong language that he had no desire to buy defendant a drink. During this initial confrontation between defendant and Oestricker, no blows were exchanged and one witness who was present at the time, Fred Ieppert, testified that this initial exchange of words was loud. And he testified further that defendant told the victim, "I thought you were a friend of mine." To this statement, Oestricker replied, "No, you are no friend of mine." This exchange of words was corroborated by the testimony of a number of other witnesses who were present that evening. After a few minutes had passed, the owner of the bar, Kenneth Vaughn, told the two men to leave the bar.

The evidence presented at trial leaves no room for doubt that defendant exited the bar before the victim. Defendant contends that Oestricker, whose blood alcohol level was determined to be

.14 was "crazy drunk" and "trying to get a fight going with anybody he could." And there was evidence that before leaving the bar, Oestricker told defendant that "[defendant] didn't scare him" and "if you want a piece of my ass just come on."

A total of five witnesses, all of whom were present immediately before and after Oestricker was shot, testified that defendant, as he was leaving the bar, turned to Oestricker and yelled, "come on motherfucker we'll settle this outside." Each of these witnesses testified that defendant began the entire confrontation when he approached Oestricker and asked the victim to buy him a drink.

The State presented testimony from a number of witnesses that as defendant walked out of the bar, he reached under his shirt and removed an object. One patron, thinking defendant had pulled a hidden knife yelled to Oestricker, ". . . he's got a knife." There was no testimony that the victim was armed with a weapon of any kind. Defendant, however, contends that there was evidence to suggest Oestricker was in possession of a pair of needlenose pliers which were found near the victim's body. However, the owner of the bar testified that the pliers belonged to him and fell outside of his pocket when he removed a handkerchief to wipe his nose while standing over the victim.

Within seconds after Oestricker stepped outside the front door, a single shot was heard. Fred Ieppert, who testified that he witnessed the shooting, stated that as Oestricker walked through the door, he saw defendant hit Oestricker with a pistol, knocking him to the ground. As Oestricker got up with his hands raised in the air, defendant pointed the pistol at the victim and fired a single shot into the victim's chest. Not a single witness testified that Oestricker was the first to strike a blow, or even had the opportunity to do so.

Further, testimony was presented that after shooting Oestricker, who by that time was lying prostrate on the ground, defendant proceeded to pistol whip the victim about the face,

drag him across the parking lot, and taunt him with the following statements: "take that you motherfucking tough guy" and "get up motherfucker and fight like a man." And defendant also told the mortally wounded victim, 'You better get up and call the hospital because you are going to die." Seconds later defendant yelled to the patrons inside the bar, "if any of the rest of you motherfuckers want some of this, come on out." Thereafter, defendant ran from the scene and fled in a waiting automobile. He was apprehended later that evening by Arnold police at a liquor store in St. Louis County.

[1] Under Missouri law, a person is entitled to use deadly force in defense of his person only when there is an absence of aggression or provocation on the part of the defender and only when there exists a real or apparently real necessity for the person defending himself to kill in order to avoid immediate danger of serious bodily injury or death. *State v. Chambers*, 671 S.W.2d 781. *See also State v. Wilson*, 645 S.W.2d 372 (Mo. 1983); *State v. Ivicsics*, 604 S.W.2d 773 (Mo. App. 1980). Furthermore, deadly force is justified only when there is a reasonable cause for the defender's belief in the need to use it and the defender has done all in his power consistent with his personal safety to avoid the danger and the need to take a life. *State v. Chambers*, 671 S.W.2d at 783.

In *Chambers I* there was evidence that the victim, Oestricker, perpetrated the initial act of physical aggression by striking defendant in the face. And in *Chambers I*, we pointed out that there was evidence that the victim was 6'4" and 250 pounds while defendant was only 5'6" and 150 pounds. In that case we held that because of the disparity in physical size and because the evidence showed the victim was the initial aggressor, there was sufficient evidence to support an instruction on self-defense and the reasonableness of defendant's course of conduct was a question that fell within the sound discretion of the jury. *State v. Chambers*, 671 S.W.2d at 783-84.

In the present case, however, there is absolutely no evidence in the record that the victim committed the initial act of physical aggression. There was simply no testimony that Oestricker, either inside or outside of the bar, committed the initial act of physical aggression. Furthermore, Dr. Leland Thomas, the certified pathologist who conducted the autopsy on the body of the victim, testified that Oestricker was only 6'0" tall and weighed approximately 200 pounds. And there was additional evidence that defendant was somewhere between 5'6" and 5'8" tall and weighed as much as 160 pounds.

The evidence presented at trial was undisputed that the initial provocation occurred when defendant, upon entering the bar with Jackie Turner, who earlier in the evening had an argument with the victim, approached the victim and requested that Oestricker buy him a drink. This request by defendant, who was already armed with a concealed pistol, elicited a profane refusal from the victim. After provoking the victim in this manner, defendant then challenged the victim to settle the matter outside. Defendant, however, was prepared to settle it with the use of a deadly weapon, which he readied for use before leaving the inside of the bar. The victim, who was unarmed, was first physically assaulted and then shot in the chest only seconds after he exited the bar.

There is simply no evidence in the record to support the conclusion that defendant was not the initial aggressor or that he did not provoke the entire series of deadly events from the time he entered the bar in the company of Jackie Turner. Furthermore, the evidence which defendant relies upon to support his theory of self-defense is woefully unconvincing that there existed either an apparent or real necessity for him to use deadly force to avoid serious bodily injury or death.

Additionally, defendant's construction of the facts in this case fails to notice an absence on his part to do all within his power consistent with his personal safety to avoid the danger and the need to take the victim's life.

Instead of immediately leaving the bar, he actively encouraged the victim to accompany him outside to settle the argument. And waiting outside the bar was the car in which defendant arrived. Rather than avoid any real or apparent danger that existed, defendant instead chose to confront the victim. Only after defendant knocked the victim to the ground, shot him in the chest, and beat the victim further did defendant flee in the waiting vehicle.

We have conducted a searching examination of the trial transcript and have considered the evidence in a light most favorable to defendant, and we are unable to conclude that there was sufficient evidence to support an instruction on self-defense or to allow the trier of fact to conclude that defendant's conduct was reasonable. Thus, we find no error in the trial court's refusal to submit defendant's tendered instruction on self-defense.

[2] Defendant next asserts that the trial court erred in refusing to sustain his motion for a change of venue. Specifically, defendant argues that the existence of pretrial publicity surrounding his case rendered it impossible for him to receive a fair trial in Jefferson County. Therefore, he contends that the trial court abused its discretion in denying defendant's motion for change of venue. In connection with the issue of pretrial publicity, the state and defendant stipulated to the existence, content and circulation of the various newspaper articles concerning defendant. Defendant filed two separate motions for change of venue and two separate hearings were held. The trial court reserved ruling on the motions until the time of trial—to allow further opportunity to determine the nature of the pretrial publicity and the existence of prejudice.

Whether a motion for change of venue should be granted or denied is a matter that properly lies within the sound discretion of the trial court. *State v. Boggs*, 634 S.W.2d 447, 457 (Mo. banc 1982); *see also State v. Molasky*, 655 S.W.2d 663, 666

(Mo. App. 1983). And for an appellate court to find an abuse of discretion, the record must establish that the minds of the inhabitants of the country are so prejudiced against defendant that a fair trial cannot be conducted. *State v. Carr*, 687 S.W.2d 606, 612 (Mo. App. 1985).

It is a settled principle of law that "exposure to publicity is not deemed inherently prejudicial and a juror may be sworn if he is able to set aside any opinion formed from the publicity when he enters the jury box." *State v. Molasky*, 655 S.W.2d 663, 667 (Mo. App. 1983), *cert. denied, Molasky v. Missouri*, 464 U.S. 1049, 104 S.Ct. 727, 79 L.Ed.2d 187 (1984); *see also State v. Blevins*, 581 S.W.2d 449, 453-54 (Mo. App. 1979). Defendant does not point to specific venirepersons who were aware of and prejudiced by the pretrial publicity. Rather, defendant assumes that because there was significant pretrial publicity, the inhabitants of Jefferson County were invariably and unalterably prejudiced against him to an extent which precluded the possiblity of a fair trial. The transcript of the two hearings held on his motions for change of venue and the transcript of voir dire, however, do not support defendant's contention that was an abuse of discretion for the trial court not to sustain defendant's motion for change of venue. All of the potential jurors were closely questioned on whether they had read or heard anything about the crime with which defendant was charged and about their ability to be fair and impartial. The trial judge's concern for the danger of a tainted jury is quite evident from the cautious manner in which he proceeded. In this connection, defendant's claim of prejudice and denial of due process is not supported by the record and we hold that the trial court did not abuse its discretion in denying defendant's request for a change of venue.

[3] Defendant's next contention concerns the trial court's refusal to prohibit the death qualification of the jury. The trial court refused to sustain defendant's objections to the prosecution's removal for cause from the venire panel those potential

jurors who expressed an inability to consider a sentence of death. In connection with the same point, defendant also assigns error to the trial court's refusal to sustain his objection to the removal for cause of a venireperson who defendant contends was improperly removed for religious reasons in violation of Mo. Const. art. I, § 5.[1]

This Court has consistently and steadfastly refused to find a constitutional violation in the practice of death qualifying a jury. *See State v. Driscoll*, 711 S.W.2d 512 (Mo. banc 1986); *State v. Roberts*, 709 S.W.2d 857 (Mo. banc 1986); *State v. Zeitvogel*, 707 S.W.2d 365 (Mo. banc 1986). *See also, Lockhart v. McCree*, _____ U.S. _____, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986). Defendant's point is denied.

[4] Defendant argues further that the removal for cause of venireperson Louis Gerleman, who stated that he would have trouble imposing a sentence of death because of his religion violated Mo. Const. art. I, § 5. The content of the transcript belies defendant's assertion that venireperson Gerleman was removed for religiously discriminatory purposes. Venireperson Gerleman was struck from the panel on the basis of his inability to follow the law and consider a sentence of death—and not because of his religious persuasion or beliefs. We find that the record is completely devoid of any evidence of religious discrimination that would offend Mo. Const. art. I, § 5.

[5] Defendant's final point assigns error to the trial court's refusal to permit defendant during closing argument to draw an adverse inference from the State's decision not to call an Arnold Police detective involved in the initial crime scene investigation. That portion of defendant's closing argument to which the State objected and which the trial court ordered removed from the record proceeded as follows:

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[1] Mo. Const. art. I, § 5 provides that "no person shall on account of his religious persuasion or belief, be . . . disqualified from . . . serving as a juror."

> We know from Kenneth Vaughn that he and Det. Hanna made a search for marks on Sunday. Det. Hanna is from the Detective Bureau. Presumably, he looked inside and outside and everywhere you might expect to find a mark.
>
> He is on their side. He is in their detective bureau. He did not call him as a witness.

Defendant is correct that "the general rule 'is that an unfavorable inference may be drawn by defendant from failure of the state to call as its witness one who was available and who might reasonably be expected to give testimony in its favor.' " *State v. Lansford*,594 S.W.2d 617, 620 (Mo. banc 1980), quoting *State v. Wallach*, 389 S.W.2d 7, 13 (Mo. 1965). First, the fact that the police never actually determined where the bullet that killed the victim ultimately embedded itself was already in evidence by way of the testimony of Kenneth Vaughn and in the form of photographic exhibits. Second, defendant *conceded at trial* that this evidence had already been admitted by way of photographic exhibits and through the testimony of Kenneth Vaughn. Because Detective Hanna's testimony would have been corroborative or cumulative to other evidence already admitted, defendant was not entitled to draw an unfavorable inference from the State's decision not to call Detective Hanna. *State v. Lansford*, 594 S.W.2d at 622. We find no abuse of discretion in the trial court's refusal to allow defendant to make this argument.

[6] In accord with § 565.0145, RSMo 1978, (repealed effective October 1, 1984 and replaced by § 565.035, RSMo Cum. Supp. 1984) we must now conduct an independent review of defendant's sentence of death. In so doing we must consider the following matters:

> (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and

(2) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 565.012; and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

[7] There is a complete absence in the record of any evidence that the sentence imposed was a product of passion, prejudice, or any other arbitrary factor. And there was substantial evidence to support the jury's finding of the mandatory statutory aggravating circumstances—that defendant committed the murder of Jerry Lee Oestricker in a wantonly vile and horrible manner on May 29, 1982 and that defendant had a substantial history of serious assaultive convictions. Section 565.012, RSMo 1978 (repealed effective October 1, 1984 and replaced by § 565.032, RSMo Cum. Supp. 1984).

In connection with the jury's finding of this latter aggravating circumstances—that defendant had a substantial history of serious assaultive convictions—the State introduced uncontroverted evidence that in 1973 defendant was convicted of felonious assault and in 1975 he was convicted of assault with intent to kill with malice aforethought. Further, the State's evidence at the sentencing phase of the trial revealed that at the time defendant murdered Jerry Lee Oestricker, he was an inmate at the Missouri Department of Corrections, St. Mary's Honor Center in St. Louis and on that evening he was free to travel outside the Honor Center because he had been issued a 24-hour pass. Finally, we note that the State produced further evidence that defendant told a probation officer after the murder of Mr. Oestricker that defendant never did achieve his life goal of killing a police officer.

[8] Finally, or mandatory independent review requires us to consider whether the sentence of death is disproportionate to the penalty imposed in similar cases, considering both the crime

and the defendant. We have examined cases involving similar circumstances and conclude that the penalty imposed in the present case is neither excessive or disproportionate to the penalty imposed in similar cases. *See e.g., State v. Smith*, 649 S.W.2d 417 (Mo. banc 1983), *cert. denied, Smith v. Missouri*, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983); *State v. LaRette*, 648 S.W.2d 96 (Mo. banc 1983), *cert. denied, LaRette v. Missouri*, 464 U.S. 908, 104 S.Ct. 262, 78 L.Ed.2d 246 (1983); *State v. Newlon*, 627 S.W.2d 606 (Mo. banc 1982), *cert. denied, Newlon v. Missouri*, 459 U.S. 884, 103 S.Ct. 185, 74 L.Ed.2d 149 (1982); *State v. Mercer*, 618 S.W.2d 1 (Mo. banc 1981), *cert. denied, Mercer v. Missouri*, 454 U.S. 933, 102 S.Ct. 432, 70 L.Ed.2d 240 (1981).

The judgment is affirmed.

HIGGINS, C. J., RENDLEN, J., and BERREY, Special Judge, concur.

BLACKMAR, J., concurs in result in separate opinion filed.

DONNELLY, J., dissents.

WELLIVER, J., dissents in separate opinion filed.

ROBERTSON, J., not sitting.

BLACKMAR, Judge, concurring in result.

There is a mystery as to why the evidence that the victim struck the defendant, knocking him to the ground, which was held to require a self-defense instruction in the first trial, was not offered in the second. If the witness were unavailable, his sworn testimony could have been read into evidence.

It would have been better for all concerned if the trial judge had given the requested instruction on self-defense. There is a risk in refusing the request. The claim of self-defense would undoubtedly have been as unconvincing to the jury as it was to the

judge. Yet I agree with the principal opinion, in concluding that there was no legal error in refusing the request.

I also agree that the sentence was not inappropriate, because of the "serious assaultive conditions." The record indicates that the defendant had a disposition toward deadly force over trivial matters, when he had the means at hand. The jury could have found that there was much more than a mere "barroom altercation," and that the armed defendant sought the victim out, deliberatley provoking a confrontation in which he intended to use his weapon to kill. It is not necessary to decide whether the murder was committed "in a wantonly vile and horrible manner."

WELLIVER, Judge, dissenting.

I respectfully dissent.

This is an ordinary barroom altercation, where, following the first trial, we reversed for failure to give a self defense instruction. No self defense instruction was given in the second trial. Whether a self defense instruction should or should not have been given on this record, I am unable to see any new or additional evidence that changes the case from a barroom altercation.

Under these circumstances, I cannot impose the death penalty. I would reduce the sentence from death to life imprisonment without parole for fity years; otherwise, proportionality in Missouri is reduced totally meaningless.

The principal opinion, I fear, becomes the best evidence for proof of a charge of ineffective counsel.

APPENDIX K

STATE of Missouri, Respondent,

James Wilson CHAMBERS, Appellant.

No. 64709.

Supreme Court of Missouri,

En Banc.

June 19, 1984

Rehearing Denied July 17, 1984.

Defendant was convicted in the Circuit Court, Jefferson County, Philip G. Hess, J., of capital murder, and he appealed. The Supreme Court, Donnelly, J., held that trial court's refusal to instruct jury on self-defense was reversible error.

Reversed and remanded for new trial.

J. Paul Allred, Jr., Jefferson City, for appellant.

John Ashcroft, Atty. Gen., Theodore A. Bruce, Asst. Atty. Gen., Jefferson City, for respondent.

DONNELLY, Judge.

Appellant James Wilson Chambers appeals from a conviction of capital murder, § 565.001, RSMo 1978, for which he was sentenced to death. Because of the sentence imposed, this Court has exclusive appellate jurisdiction. Mo. Const. art. V, § 3 (amended effective December 2, 1982).

The Country Club Lounge is a roadside tavern. Early in the evening on May 29, 1982, Steve Oestricker got into an argument with another patron, Jackie Turner. At the owner's request, Jackie Turner and his family left the tavern. Appellant Chambers arrived around 10:00 p.m. and asked for the Turners. Chambers then left and returned with Jackie Turner. Upon

entering the tavern, Chambers asked Oestricker to buy him a drink. Oestricker refused. Chambers then said, "I thought you were a friend of mine," and Oestricker responded "you're no friend of mine." The owner then told the two to take their problems outside. It is from this point that there is conflicting evidence.

According to the State's evidence: while walking out the door Chambers reached under his shirt and pulled a pistol from his pants, cocked it and concealed it from Oestricker. Oestricker, unarmed, followed Chambers outside. Once both were outside, Chambers struck Oestricker in the face with the pistol, knocking him to the ground. As Oestricker attempted to get up, Chambers shot him in the chest. Chambers then kicked Oestricker and beat him several times in the face with the pistol.

According to appellant's evidence: he was completely outside the door when he drew the pistol. Oestricker initially walked up to him and struck him in the face, knocking him to the ground. He got up and shot Oestricker who staggered back to a wall. Chambers then walked over and struck Oestricker several times in the face with the pistol, causing Oestricker to fall to the ground.

Appellant Chambers tendered a self-defense instruction at trial. It is well established that:

> [W]here the evidence is conflicting or of such a character that different inferences might reasonably be drawn therefrom, it is generally a question of fact for the jury to determine whether the accused acted in self-defense * * *.

State v. Jackson, 522 S.W.2d 317, 319 (Mo. App. 1975); *see also State v. Wilson*, 645 S.W.2d 372 (Mo. 1983); *State v. Rash*, 359 Mo. 215, 221 S.W.2d 124 (1949); *State v. Miller*, 653 S.W.2d 222 (Mo. App. 1983); *State v. Eskina*, 606 S.W.2d 270 (Mo. App. 1980); *State v. Simms*, 602 S.W.2d 760 (Mo. App. 1980); *State v. Thornton*, 532 S.W.2d 37 (Mo. App. 1975). The

trial court refused to instruct on self-defense on the grounds that there was not a "scintilla of evidence" supporting such a submission.

[1,3] The right of self-defense is a person's privilege to defend himself against personal attack. *State v. Ivicsics*, 604 S.W.2d 773 (Mo. App. 1980). Deadly force may be used in self-defense only when there is (1) an absence of aggression or provocation on the part of the defender, (2) a real or apparently real necessity for the defender to kill in order to save himself from an immediate danger of serious bodily injury or death, (3) a reasonable cause for the defender's belief in such necessity, and (4) an attempt by the defender to do all within his power consistent with his personal safety to avoid the danger and the need to take a life. *Wilson, Rash, supra; State v. Hicks*, 438 S.W.2d 215 (Mo. 1969). In examining the record for evidence of self-defense, we must consider the evidence in light most favorable to appellant Chambers. *State v. Thomas*, 625 S.W.2d 115 (Mo. 1981).

[4] Although there was a verbal exchange inside the tavern, the initial act of physical aggression occurred when Oestricker struck Chambers in the face. Consequently, a jury could reasonably conclude that Oestricker, not Chambers, was the initial aggressor.

[5,6] Chambers is small in stature—5'6" tall and weighing 150 pounds. Oestricker, on the other hand, was 6'4" and 250 pounds. Something more than fear of size, however, is required to justify the use of deadly force in self-defense. Some affirmative action, gesture or communication by the person feared indicating the immediacy of the danger, the ability to avoid it and the necessity of using deadly force must also be present. *Jackson, supra; State v. Isom*, 660 S.W.2d 739 (Mo. App. 1983). In *Hicks, supra*, the victim was not only much larger than the defendant but was also the initial aggressor. This Court found that these factors created an appearance of necessi-

ty for defendant to use deadly force to protect himself against severe bodily harm. Certainly, appellant could have drawn the same conclusion here.

[7,8] The reasonableness of a defender's belief in the necessity of using deadly force is generally a question for the jury. *State v. Swindell*, 357 Mo. 1090, 212 S.W.2d 415 (1948); *State v. McGowan*, 621 S.W.2d 557 (Mo. App. 1981); *Eskina* and *Thornton, supra*. In *State v. Gordon*, 191 Mo. 114, 89 S.W. 1025 (1905), the victim, a much larger man than the defendant, assaulted the defendant with his fist. This Court found that "considering the great disparity in weight and size and the character of the assault, it should have been submitted to the jury whether defendant had not reasonable cause to apprehend that deceased was about to kill him or do him some great bodily harm" *Id.*, 191 Mo. at 130, 89 S.W. at 1030. The same holds true in the case at hand; the issue should have been submitted to the jury.

[9] The final element of self-defense is that appellant Chambers did all within his power consistent with his personal safety to avoid the danger and the taking of human life. In *State v. Bartlett*, 170 Mo. 658, 71 S.W. 148 (1902), this Court noted that a "man, because he is the physical inferior of another, * * * is [not] * * * bound to submit to a public [assault]. * * * [I]f nature has not provided the means for such resistance, art may; in short, a weapon may be used * * *." *Id.*, 170 Mo. at 670-71, 71 S.W. at 152. "In resisting an assault a person is not required to determine with absolute certainty * * * the amount of force necessary for that purpose * * *. [T]he law does exact of him [however] that he shall not use any more force than shall reasonably appear to him in the circumstances to be necessary * * *." *Rash*, 359 Mo. at 218, 221 S.W.2d 126. Here the circumstances were such that considering physical attributes alone, appellant Chambers was no match for the victim. Further, the victim was the initial aggressor. Although appellant

could easily have shot the victim before the victim got close enough to throw the first punch, appellant did not choose this alternative. While appellant might have pursued a course of conduct other than shooting the victim, the reasonableness of such other conduct would be within the sound discretion of the jury. *Miller, supra.*

[10] While the evidence of self-defense is not so unequivocal as to mandate a directed verdict of acquittal, the evidence is sufficient to justify submission of self-defense to the jury. *State v. Sherrill*, 496 S.W.2d 321 (Mo. App. 1973); *State v. Peoples*, 621 S.W.2d 324 (Mo. App. 1981). The failure to do so constitutes reversible error.

Appellant Chambers also contends that the trial court erred in admitting the testimony of two State witnesses concerning alleged threats he made towards them on the evening of the shooting. The State strains to justify the admission of this evidence on the grounds that it was "relevant to the identity of the murderer in that appellant was identified as being in the car that drove up to the bar with the murderer of the victim and which left with the murderer after the crime." We need not rule the contention on this appeal.

The judgment is reversed and the cause is remanded for new trial.

All Concur.

APPENDIX L

IN THE SUPREME COURT OF MISSOURI

No. 67191

State of Missouri,
Respondent.

vs.

James Chambers,
Appellant.

IN THE JEFFERSON COUNTY CIRCUIT COURT
TWENTY-THIRD JUDICIAL CIRCUIT, DIVISION III
Honorable John L. Anderson, Judge

No. CR182-418-FX-J3

State of Missouri,
Plaintiff,

vs.

James Chambers,
Defendant.

TRANSCRIPT ON APPEAL
VOLUME IV

Mr. John Rayfield
Assistant Prosecuting Attorney
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Hillsboro, Missouri 63050
Attorney for Plaintiff

Mr. Donald J. Hager
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VOLUME IV

[662] MR. KEHM: Have you got that extra set the Court gets? I want to look through them real fast.

THE COURT: Okay. The Court has previously given as Instruction No. 1 MAI-CR 2.01, which was prepared and submitted by the State and the Court has also previously given as Instruction No. 2 at the outset of these proceedings MAI-CR 2.02 which was prepared and submitted by the State.

The Court would now propose to give the introduction to the balance of the instructions which is MAI-CR 2.03 and that instruction was prepared and submitted by the State and will be given in the form submitted.

The Court would then propose to give as Instruction No. 4 the burden of proof instruction which is the new one, MAI-CR 2.20 which defines "reasonable doubt" and that was prepared and submitted by the State and that will be given in the form submitted.

The Court would then propose to give as Instruction No. 5 the verdict directing instruction on capital murder. That's MAI-CR 15.02. That was prepared and submitted by the State, and I believe that's the same instruction that was given in the first trial that has been to the Missouri Supreme Court and back.

The Court would then propose to give as Instruction No. 6 the Defendant's converse instruction to the — to that part of **[663]** the instruction that addresses the subject of reflected coolly and fully before shooting. That's MAI-CR 2d 15.02, 3.02. That was prepared and submitted by Defendant and will be given in the form submitted.

The Court would then propose to give as Instruction No. 7 the lesser included murder second which is MAI-CR 15.14 prepared and submitted by the State. I believe that was also given in the original trial. And, that will be given in the form submitted.

The Court would then propose to give as Instruction No. 8 a converse submitted by the Defendant conversing the anger, fear, or agitation suddenly provoked by the unexpected or conduct of Jerry Oestricker. - That's MAI-CR 2d 15.14, 3.02. Prepared and submitted by Defendant and that will be given in the form submitted.

The Court would then propose to give as Instruction No. 8 the final lesser included of manslaughter.

MR. HAGER: Should that be 9?

THE COURT: I'm sorry, 9. I'm sorry. Thank you. That's MAI-CR 15.18 prepared and submitted by the State. That was also given in the first case and will be given in the form submitted.

The Court would then propose to give as Instruction No. 10 the admonishment that the Defendant has the right not to testify. That was prepared and submitted by the Defendant and that was **[664]** MAI-CR 2d 3.76, and that would be given in the form submitted.

The Court would then propose to give as Instruction No. 11 the verdict mechanics instruction that nine or more — not nine or more, unanimous verdict, et cetera, MAI-CR — scared Don a little bit there.

MR. HAGER: I was thinking about — I think he put something in the coffee. There is something in the coffee. I was thinking about something.

THE COURT: MAI-CR 2.80, and that was prepared and submitted by Defendant and that will be — submitted by the State and that will be given in the form submitted.

The Court would then propose to give as Instruction — the final instruction, an attorney argument instruction, and that's No. 12 and that's MAI-CR 2.68 prepared and submitted by the State and that will be given in the form submitted.

Any other — and then, finally, the Defendant has offered a self-defense instruction MAI-CR 2d 2.41 offered by Defendant. That will be endorsed — that will be marked as Instruction A and endorsed at the bottom "refused by the court".

Now then, any other instructions to be offered?

MR. HAGER: Not by me, Your Honor. I have only been furnished by the Prosecutor with one verdict form at this point.

MR. RAYFIELD: Well, the reason I do that is because we have to put the number reference in there and I want to do that one at a time so we can get the correct numbers.

[665] Your honor, at this time verdict forms — and they, of course, must be cross-referenced to the various verdict directing instructions —

THE COURT: Let me have those.

MR. RAYFIELD: The first one I have is the guilty of capital murder, original and one copy to the Court.

THE COURT: Okay. That should have a reference to Instruction No. 5.

MR. RAYFIELD: Secondly I have a verdict directing instruction on guilty as to murder in the second degree, and that should be Instruction No. 7. I know of one verdict directing instruction as to guilt on manslaughter.

THE COURT: That should be Instruction No. 9.

MR. RAYFIELD: And I also have one on not guilty, the final one.

THE COURT: All right. There will be three verdict forms from MAI-CR 2.88A and one from MAI-CR 2.88B. All of the verdict form were prepared and submitted by the State and will be given in the form submitted. There are forms of verdict for each of the three verdict directors and one for not guilty. Anything else now?

MR. KEHM: On instructions?

THE COURT: Yes.

MR. RAYFIELD: Nothing on instructions, Your Honor.

THE COURT: Anything else? How much time do you all —

* * * * * *

APPENDIX M

HOMICIDES COMMITTED AFTER MAY 25, 1977

15.02 Capital Murder

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) _____, in the (City) (County) of _____, State of Missouri, the defendant caused the death of [*name of victim*] by [*insert means by which death was caused, such as shooting, stabbing, cutting, or striking, without further description*] him, and

Second, that the defendant intended to take the life of [*name of victim*], and

Third, that the defendant knew that he was practically certain to cause the death of [*name of victim*], and

Fourth, that the defendant considered taking the life of [*name of victim*] and reflected upon this matter coolly and fully before doing so, (and)

(Fifth, the the death of [*name of victim*] was not (a justifiable homicide) (an excusable homicide) (a justifiable homicide or an excusable homicide) as submitted in (Instruction No. _____) (Instruction No. _____ and Instruction No. _____),)

then you will find the defendant guilty (under Count _____) of capital murder (, unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. _____).

(However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty (under Count _____) of that offense.)

Notes on Use

1. Sections 565.001 and 565.008.1, RSMo. **See Supplemental Notes on Use under MAI-CR 15.00.**

2. Section 565.001 provides that any person who unlawfully, etc. "kills or causes the killing" of another is guilty of capital murder. MAI-CR 15.02 may be altered to fit the facts where the defendant "causes the killing", as by coercing or hiring a third person to commit the murder. See *State v. Deyo*, 358 S.W.2d 816 (Mo. 1962), and the statutory aggravating circumstance set out in Section 565.012.2(6).

3. Paragraph Fifth must be used if the defense of justifiable or excusable homicide or both are justified by the evidence and if either is or both are submitted in separate instructions.

4. The paragraph beginning with "However" must be omitted where the case is submitted with a separate additional instruction on mental disease or defect excluding responsibility. See MAI-CR 2.30.

5. If capital murder is submitted to the jury, the punishment for that offense and for any lesser included offense will not be submitted to the jury in the state's verdict directing instructions, even if the death penalty was waived.

INSTRUCTIONS REQUIRED IF REQUESTED

3.02 Converse: One Element

If you do not find and believe from the evidence beyond a reasonable doubt that [*insert the single, essential element to be negatived, such as "at the time the check was given to _____ defendant intended to cheat or defraud him," or "defendant intended to steal property in the building"*], you must find the defendant not guilty (under Count _____) of _____.

Notes on Use

1. A separate converse must be given if requested in the manner provided by Rule 20.02, even if a general converse has been added to the state's verdict directing instruction and without regard to whether or not other instructions have "fully and fairly" covered the matter. The court should not attempt to determine whether or not the subject matter of the converse is "fully and fairly" covered by other given instructions, including the verdict directing instruction.

2. Converses, to fall within the above rule, should be more than "mere cautionary instructions or an instruction dealing with reasonable doubt," *State v. McWilliams*, 331 S.W.2d 610 (Mo. 1960) or an instruction on a "collateral" matter. *State v. Ledbetter*, 332 Mo. 225, 58 S.W.2d 453 (1933). It is only where the converse is directed to the state's main "law of the case" instruction that its refusal will be error. *State v. McWilliams*, supra.

3. A pure negative converse requires no evidence to sustain it. It is *not* a "special negative defense" of the type referred to in the *Notes on Use* under MAI-CR 2.04.

4. If the defendant requests MAI-CR 3.04 in the manner provided by Rule 20.02, it should be given instead of MAI-CR 3.02. If a defendant requests either MAI-CR 3.06 or 3.08 in the manner provided by Rule 20.02, one of such instructions should be given. However, only one converse should be given for each verdict directing instruction. *State v. Murphy*, 415 S.W.2d 758 (Mo. banc 1967). If defendant requests more than one converse, the court should give only one instruction, selected by the court, and should refuse the other.

HOMICIDES COMMITTED AFTER MAY 25, 1977

15.14 Murder: Second Degree, Conventional

((As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt:

First, that (on) (on or about) _____, in the (City) (County) of _____, State of Missouri, the defendant caused the death of [*name of victim*] by [*insert means by which death was caused, such as shooting, stabbing, cutting, or striking, without further description*] him, and

Second, that the defendant intended to (take the life of) (cause serious bodily harm to) [*name of victim*], and

Third, that the defendant did not do so in (anger) (fear) (agitation) suddenly provoked by the unexpected acts or conduct of [*name of victim*], (and)

(Fourth, that the death of [*name of victim*] was not (a justifiable homicide) (an excusable homicide) (a justifiable homicide or an excusable homicide) as submitted in (Instruction No. _____) (Instruction No. _____ and Instruction No. _____),)

then you will find the defendant guilty (under Count _____) of murder in the second degree (, unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. _____).

(However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty (under Count _____) of that offense.)

(If you do find the defendant guilty (under Count _____) of murder in the second degree you will fix his punishment at

imprisonment by the Department of Corrections for a term fixed by you, but not less than ten years nor more than life imprisonment.)

Notes on Use

1. Sections 559.020 and 565.008.2, RSMo.

2. **See the applicable Notes on Use and Caveats under MIA-CR 15.00.** Note that an instruction on manslaughter (MAI-CR 15.18) must be given even if conventional second degree murder is the only other homicide submitted.

3. The Third paragraph does not require the state to produce direct or eye-witness evidence that the defendant acted without provocation. The facts submitted in that paragraph may be inferred by the jury from proven facts and circumstances. Once a prima facie case of conventional second degree murder is made out, it will be the jury's function to determine whether or not the killing was intentional, *State v. Bolden,* 494 S.W.2d 61, 65 (Mo. 1973), and committed without provocation. *State v. Stapleton,* 518 S.W.2d 292, 299-300 (Mo. banc 1975).

4. The Fourth paragraph must be used if the defenses of justifiable or excusable homicide or both are justified by the evidence and are submitted in separate instructions.

5. The paragraph beginning with the word "However" must be omitted (1) where the case is submitted with a separate, additional instruction on mental disease or defect excluding responsibility, see MAI-CR 2.30, or (2) where a separate, additional instruction is given under MAI-CR 15.16 on Murder: Second Degree, Felony-Murder.

6. If capital murder is submitted as a higher homicide, omit the submission of punishment in MAI-CR 15.14, even if the death penalty for capital murder was waived.

7. The lead-in or introductory sentence drawn from MAI-CR 2.05 must be used, with the exception noted below, where second degree murder is submitted along with either capital murder or murder in the first degree or both.

The exception will arise where under one count there is evidence justifying the submission of both conventional murder in the second degree (MAI-CR 15.14) and felony-murder in the second degree (MAI-CR 15.16) along with either capital murder or murder in the first degree or both. In such case neither one of the second degree

murder instructions will have an MAI-CR 2.05 introductory sentence. However, in such a case one separate instruction must be given immediately before the giving of the first instruction submitting second degree murder, reading as follows:

> (As to Count _____, if) (If) you do not find the defendant guilty of (capital murder) (murder in the first degree) (capital murder or murder in the first degree), you must consider whether he is guilty of murder in the second degree as submitted in Instruction No. _____ or as submitted in Instruction No. _____.

If an occasion should arise where, in addition to the situation here hypothesized, there is more than one second degree *felony-murder* instruction given under any one count, as hypothesized in Note on Use 7 under MAI-CR 15.16, the procedure there indicated will be followed. The only separate instruction given will be the one set out in that Note on Use.

When the occasion arises for submitting more than one murder in the second degree offense under any one count, the numbers of those instructions submitting murder in the second degree must **not** be written by the court into the second degree murder verdict forms when supplied to the jury. The verdict forms in any such case will follow the directions in MAI-CR 15.52.

INSTRUCTIONS REQUIRED IF REQUESTED

3.02 Converse: One Element

If you do not find and believe from the evidence beyond a reasonable doubt the [*insert the single, essential element to be negatived, such as "at the time the check was given to _____ defendant intended to cheat or defraud him" or "defendant intended to steal property in the building"*], you must find the defendant not guilty (under Count _____) of _____.

Notes on Use

1. A separate converse must be given if requested in the manner provided by Rule 20.02, even if a general converse has been added to the state's verdict directing instruction and without regard to whether or not other instructions have "fully and fairly" covered the matter. The court should not attempt to determine whether or not the subject matter of the converse is "fully and fairly" covered by other given instructions, including the verdict directing instruction.

2. Converses, to fall within the above rule, should be more than "mere cautionary instructions or an instruction dealing with reasonable doubt," *State v. McWilliams,* 331 S.W.2d 610 (Mo. 1960) or an instruction on a "collateral" matter. *State v. Ledbetter,* 332 Mo. 225, 58 S.W.2d 453 (1933). It is only where the converse is directed to the state's main "law of the case" instruction that its refusal will be error. *State v. McWilliams,* supra.

3. A pure negative converse requires no evidence to sustain it. It is *not* a "special negative defense" of the type referred to in the *Notes on Use* under MAI-CR 2.04.

4. If the defendant requests MAI-CR 3.04 in the manner provided by Rule 20.02, it should be given instead of MAI-CR 3.02. If a defendant requests either MAI-CR 3.06 or 3.08 in the manner provided by Rule 20.02, one of such instructions should be given. However, only one converse should be given for each verdict directing instruction. *State v. Murphy,* 415 S.W.2d 758 (Mo. banc 1967). If defendant requests more than one converse, the court should give only one instruction, selected by the court, and should refuse the other.

HOMICIDES COMMITTED AFTER MAY 25, 1977

15.18 Manslaughter: Conventional

((As to Count _____, if) (If) you do not find the defendant guilty of [*insert all higher graded homicides submitted, e.g. "capital murder or murder in the second degree"*], then you must consider whether he is guilty of manslaughter.)

(As to Count _____, if) (If) you find and believe from the evidence beyond a reasonable doubt that (on) (on or about) _____ in the (City) (County) of _____, State of Missouri, the defendant caused the death of [*name of victim*] by [*insert means by which death was caused, such as shooting, stabbing, cutting, etc., without further description*] him, (and that death was not (a justifiable homicide) (an excusable homicide) (a justifiable or an excusable homicide) as submitted in (Instruction No. _____) (Instruction No. _____ and Instruction No. _____),)

Then you will find the defendant guilty (under Count _____) of manslaughter (, unless you find and believe from the greater weight of the evidence that the defendant is not guilty by reason of a mental disease or defect excluding responsibility as submitted in Instruction No. _____).

(However, if you do not find and believe from the evidence beyond a reasonable doubt each and all of the foregoing, then you must find the defendant not guilty (under Count _____) of that offense.)

(If you find the defendant guilty (under Count _____) of manslaughter you will fix his punishment:

1. By imprisonment by the Division of Corrections for a term fixed by you, but not less than two nor more than ten years, or

2. By confinement in the county jail for a term fixed by you, but not less than six months nor more than one year, or

3. By a fine fixed by you, but not less than $500 nor more than $1,000, or

4. By both a fine fixed by you, but not less than $100 or more than $1,000, and confinement in the county jail for a term fixed by you, but not less than three months nor more than one year.)

Notes on Use

1. Section 559.070, RSMo.

2. **See Notes on Use under MAI-CR 15.00.** Note that an instruction on *conventional* manslaughter (MAI-CR 15.18) must be given as a lesser included offense of any higher homicide submitted to the jury.

3. The matter in parentheses relating to justifiable and excusable homicide must be used if either one of those defenses is or both are justified by the evidence and submitted in separate instructions.

4. The paragraph beginning with "However" must be omitted where the case is submitted with a separate, additional instruction on mental disease or defect excluding responsibility. See MAI-CR 2.30.

5. If capital murder is submitted as a higher homicide, omit the submission of punishment in MAI-CR 15.18 even if the death penalty for capital murder was waived.

APPENDIX N

[767] When you consider the evidence and weigh all of the aggravating factors, his assualts, shootings, his whole life; and, second, what he did to Jerry Oestricker in this particular murder, it may not be easy but I think you'll know it's right.

That's all I can ask you to do is to consider it. I'm asking you to consider it and make your decision. But, I think you will see that it's right and it's a thing that must be done. Thank you.

THE COURT: Mr. Hager?

MR. HAGER: Your Honor, I will waive oral argument.

THE COURT: Ladies and gentlemen of the jury,

Instruction No. 17. The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case.

All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law. I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

Instruction No. 18. In determining the punishment to be assessed against the Defendant for the murder of Jerry Lee Oestricker you must first unanimously determine, (1) Whether the Defendant has a substantial history of serious assaultive [768] convictions, or (2) Whether the murder of Jerry Lee Oestricker involved depravity of mind and that as a result thereof it was outrageously or wantonly vile or horrible.

You are instructed that the burden rests upon the State to prove beyond a reasonable doubt at least one of the foregoing circumstances and that it is an aggravating circumstance.

The Defendant is not required to approve or disapprove anything. Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and it is an aggravating circumstance you must return a verdict fixing the punishment of the Defendant at imprisonment for life by the Division of Corrections without eligibililty for probation or parole until he has served a mimimum of 50 years of his sentence.

Instruction No. 19. If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 18 exists and that at least one of them is an aggravating circumstance it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of the Defendant.

In deciding that question you may consider all of the evidence relating to the murder of Jerry Lee Oestricker. You may also consider any of the aggravating circumstances referred to in Instruction No. 18 which you found beyond a reasonable [769] doubt.

You may also consider any of the following circumstances if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance: (1) That the Defendant was convicted in Washington County, Missouri, on July 27th, 1972 of the felony offense of burglary in the second degree; (2) That the Defendant was convicted in Jefferson County, Missouri on July 27th, 1972 of the felony offense of burglary and stealing; (3) That the Defendant was convicted in Morgan County, Missouri on April 16th, 1975 of the felony offense of assault with intent to kill with malice aforethought; (4) That the Defendant was convicted in Jefferson County, Missouri on February 16th, 1973 of the felony offense of felonious assault.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or

circumstances exist to warrant the imposition of death as Defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of 30 years of his sentence.

Instruction No. 20. If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as submitted in Instruction No. 19 it will then become your duty to determine whether a sufficient mitigating **[770]** circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist.

In deciding that question you may consider all of the evidence relating to the murder of Jerry Oestricker. You may also consider any circumstance which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist then you must return a verdict fixing Defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of 50 years of his sentence.

Instruction No. 21. Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

Instruction No. 22. You will be provided with forms of verdict for your convenience. You cannot return any verdict as the verdict of the jury until all 12 jurors concur and agree to it. But, it should be signed by your foreman alone.

If you decide after considering all of the evidence and instructions of law given to you that the Defendant must be put to death for the murder of Jerry Lee Oestricker your foreman * * *

APPENDIX O

INSTRUCTION NO. 17

The law applicable to this stage of the trial is stated in these instructions and those which were read to you when we began this phase of the case.

All of these instructions will be given to you to take to your jury room for use during your deliberations.

You must not single out certain instructions and disregard others or question the wisdom of any rule of law.

I do not mean to assume as true any fact referred to in these instructions but leave it to you to determine what the facts are and what the punishment should be.

INSTRUCTION NO. 18

In determining the punishment to be assessed against the defendant for the murder of Jerry Lee Oestricker, you must first unanimously determine:

1. Whether the Defendant has a substantial history of serious assaultive convictions, or

2. Whether the murder of Jerry Lee Oestricker involved deprevity of mind and that as a result thereof it was outrageously or wantonly vile or horrible.

You are further instructed that the burden rests upon the state to prove beyond a reasonable doubt at least one of the foregoing circumstances, and that it is an aggravating circumstance. The defendant is not required to prove or disprove anything.

Therefore, if you do not unanimously find from the evidence beyond a reasonable doubt that at least one of the foregoing circumstances exists and it is an aggravating circumstance, you must return a verdict fixing the punishment of the defendant at imprisonment for life by the Division of Corrections without

eligibililty for probation or parole until he has served a mimimum of 50 years of his sentence.

INSTRUCTION NO. 19

If you find and believe from the evidence beyond a reasonable doubt that one or more of the circumstances submitted in Instruction No. 18 exists and that at least one of them is an aggravating circumstance, it will then become your duty to decide whether a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as punishment of the defendant. In deciding that question you may consider all of the evidence relating to the murder of Jerry Lee Oestricker.

You may also consider any of the aggravating circumstances referred to in Instruction No. 18 which you found beyond a reasonable doubt.

You may also consider any of the following circumstances if you find from the evidence beyond a reasonable doubt that it exists and that it is an aggravating circumstance:

1. That the defendant was convicted in Washington County, Missouri, on July 27th, 1972 of the felony offense of Burglary in the Second Degree;

2. That the defendant was convicted in Jefferson County, Missouri on July 27th, 1972 of the felony offense of Burglary and Stealing;

3. That the defendant was convicted in Morgan County, Missouri on April 16th, 1975 of the felony offense of Assault with Intent to Kill with Malice Aforethought;

4. That the defendant was convicted in Jefferson County, Missouri on February 16th, 1973 of the felony offense of Felonious Assault.

If you do not unanimously find from the evidence beyond a reasonable doubt that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as defendant's punishment, you must return a verdict fixing his punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of 50 years of his sentence.

INSTRUCTION NO. 20

If you decide that a sufficient aggravating circumstance or circumstances exist to warrant the imposition of death as submitted in Instruction No. 19, it will then become your duty to determine whether a sufficient mitigating circumstance or circumstances exist which outweigh such aggravating circumstance or circumstances so found to exist. In deciding that question you may consider all of the evidence relating to the murder of Jerry Oestricker.

You may also consider any circumstance which you find from the evidence in extenuation or mitigation of punishment.

If you unanimously decide that a sufficient mitigating circumstance or circumstances exist which outweigh the aggravating circumstance or circumstances found by you to exist, then you must return a verdict fixing defendant's punishment at imprisonment for life by the Division of Corrections without eligibility for probation or parole until he has served a minimum of 50 years of his sentence.

INSTRUCTION NO. 21

Even if you decide that a sufficient mitigating circumstance or circumstances do not exist which outweigh the aggravating circumstance or circumstances found to exist, you are not compelled to fix death as the punishment. Whether that is to be your final decision rests with you.

NO. 90-425

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

Bill Armontrout, Warden
Missouri State Penitentiary

Petitioner,

vs.

James W. Chambers,

Respondent.

Petition For Writ Of Certiorari To The
United States Court of Appeals
For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

II.

THE QUESTION OF WHETHER OR NOT AN ATTORNEY'S FAILURE TO INVESTIGATE IS TRIAL STRATEGY IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS ACCORDED STATE COURT FINDINGS OF FACT UNDER 28 U.S.C. §2254(D).

III.

COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND V. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL; SUCH COURTS DO NOT CREATE "PER SE" RULES SIMPLY BY DOING SO.

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STATEMENT OF THE CASE

Respondent hereby corrects and clarifies Appellant's Statement of the case by adding the following omitted facts:

In December, 1982, Respondent was convicted of Capital Murder for shooting Jerry Lee Oestricker outside a bar in Arnold, Missouri. At his 1982 trial, Respondent's counsel called one witness on his behalf. This eyewitness, James Jones, testified that the victim followed Respondent out of the bar, and when Respondent turned to face the victim, the victim hit Respondent in the face, knocking him to the ground. State v. Chambers, 671 S.W.2d 781, 783 (Mo.banc 1984).

The Supreme Court of Missouri reversed Respondent's

conviction, holding that the testimony described above warranted submission of a self-defense instruction to the jury, since such an instruction was requested. Id.

On retrial, Respondent's counsel called no witnesses on Respondent's behalf. He did not interview, nor did he attempt to contact, James Jones. Chambers v. State, 745 S.W.2d 718 (Mo.App. 1987).

The U.S. Court of Appeals For The Eighth Circuit, En banc, reversed Respondent's conviction, holding that trial counsel was ineffective for failure to interview or call James Jones as a witness. (Petitioner's Appendix To Petition For A Writ of Certiorari, A-2 - A-29) (hereinafter referred to as "Petitioner's Appendix").

ARGUMENT

I.

THIS COURT SHOULD NOT GRANT CERTIORARI HEREIN, BECAUSE THIS CASE PRESENTS NO SPECIAL AND IMPORTANT REASONS FOR THIS COURT TO EXERCISE ITS DISCRETIONARY JURISDICTION.

U.S. Supreme Court Rule 10.1 clearly provides that this Court's certiorari review is discretionary, and should be exercised "only when there are special and important reasons therefor." Rule 10.1, Rules of the Supreme Court of the United States. Petitioner has not shown, nor even alleged, that special and important reasons exist for this Court to exercise its jurisdiction. Petitioner has simply alleged that the decision of the U.S. Court of Appeals for the Eighth Circuit, en banc, is in error.

The case at bar presents a unique set of circumstances, unlike

those in any case cited by Petitioner or Respondent throughout this litigation. Respondent was tried and convicted of capital murder and sentenced to death. His conviction was reversed by the Missouri Supreme Court, and that reversal was based completely upon the testimony of a single witness. State v. Chambers, 671 S.W.2d 781 (Mo.banc 1984). Respondent was retried without the benefit of that witness' testimony, because Respondent's trial counsel failed to contact, interview, or call this witness.

The Eighth Circuit's decision that Respondent's trial counsel was ineffective simply applied to the facts herein this Court's standards as set out in Strickland v. Washington, 466 U.S. 668 (1984). This Court has often pointed out, there is no clear rule as to what constitutes effective or ineffective assistance of counsel. Ineffectiveness in each case must be decided on the basis of its own facts and circumstances. Id. at 688-690. This Court has already set parameters to guide the lower courts in making this determination. Id. These parameters were clearly followed by the Eighth Circuit in Chambers v. Armontrout, No. 88-2383 (8th Cir. July 5, 1990) (En banc) (Petitioner's Appendix, A-2 - A-29), and do not need further clarification by this Court. Strickland v. Washington, supra. It is difficult to see how the Eighth Circuit's decision in this case could have a broad application or importance beyond the unique factual limits of the case at bar.

The purpose of the writ of certiorari is not to correct possible errors made by federal courts of appeal. This Court has held:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is real and embarrassing conflict of opinion and authority between the circuit courts of appeal. Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393.

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70, 79 (1955). In the instant case, there is no conflict among the circuits and no principle, important to the public, which needs to be settled by this Court. Therefore, this Court should not grant Petitioner's Petition for Writ of Certiorari.

II.

THE QUESTION OF WHETHER OR NOT AN ATTORNEY'S FAILURE TO INVESTIGATE IS TRIAL STRATEGY IS A MIXED QUESTION OF LAW AND FACT WHICH IS NOT ENTITLED TO THE PRESUMPTION OF CORRECTNESS ACCORDED STATE COURT FINDINGS OF FACT UNDER 28 U.S.C. §2254(D).

Petitioner claims that the Eighth Circuit has ignored the statutory presumption of correctness accorded state court findings of fact under 28 U.S.C. §2254(D), because it disagreed with the Missouri Court of Appeals' opinion that Respondent's trial counsel's failure to investigate James Jones was deliberate trial strategy.

In fact, the question of whether or not any decision of counsel is strategic is a mixed question of law and fact. Kubat v. Thieret, 867 F.2d 351, 367 (7th Cir. 1989). "The Illinois Supreme Court found that counsel's decision to omit character testimony was a strategic decision. (citation omitted). The state argues that this finding is one of fact, entitled to the presumption of correctness required by 28 U.S.C. §2254(D). We disagree." Id. at

n. 12.

This Court has consistently held that the presumption of correctness applies to "basic, primary or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators'" Cuyler v. Sullivan, 446 U.S. 335, 342 (1980) quoting Townsend v. Sain, 372 U.S. 293, 309 (1963) and Brown v. Allen, 344 U.S. 443, 506 (1953) (opinion of Frankfurter, J.). There is a material distinction between these types of facts and interpretations of strategy which require the application of legal principles to those facts. Cuyler v. Sullivan, supra at 342.

Courts have held the following questions to be mixed questions of law and fact: whether trial counsel's decision to omit character testimony is trial strategy, Kubet v. Thieret, supra; whether or not an attorney is adequately prepared for trial, Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981); reasonableness of trial counsel's decision to withhold a possible jury instruction, U.S. ex rel. Barnard v. Lane, 819 F.2d 798, 804 (7th Cir. 1987); whether or not an identification witness had an adequate opportunity to view a defendant, Dickerson v. Fogg, 692 F.2d 238, 243 (2nd. Cir. 1982). This litany of cases suggests a uniformity among the circuits rather than a conflict.

If we were only dealing with the questions of whether or not Respondent's trial counsel interviewed witnesses, attempted to contact witnesses, or reviewed transcripts of prior testimony there would be no dispute that the findings of fact are entitled to the presumption of correctness. Cuyler v. Sullivan, supra at 342.

However, whether or not a decision to forego such investigation is trial strategy or an unreasonable limitation on counsel's investigation requires applying legal principles to historical facts. Id.

The parameters set out in Strickland v. Washington, supra, for measuring the effectiveness of counsel's performance, apply with particular relevance to the instant case.

> Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Strickland v. Washington, supra at 690-691. Characterizing an act or omission as trial strategy puts the stamp of reasonableness on it, and makes it "virtually unchallengeable." However, it is clearly the intent of Strickland that the question of reasonableness is a legal one. The State of Missouri suggests the federal reviewing court can't make that determination, contrary to Strickland. "Ineffectiveness is not a question of 'basic, primary or historical fact' (citations omitted) . . . it is a mixed question of law and fact.'" Strickland v. Washington, supra, at 698.

In the instant case, Respondent's counsel reviewed the transcripts of James Jones' prior testimony, but he did not attempt to contact or interview Jones. He called no witnesses to testify

on Respondent's behalf. These are the historical facts which form the basis for Respondent's complaint of ineffectiveness. Determining whether or not this course of action was reasonable requires applying the law of Strickland to these facts. To hold otherwise would effectively preclude review of ineffectiveness claims, simply by characterizing all unreasonable courses of action as "trial strategy."

The dissent (called "well-reasoned and thorough" by Petitioner, Petition For Writ Of Certiorari, at 16) argues strongly against reversal herein. Yet nowhere in his dissent does Circuit Judge John R. Gibson suggest that the majority opinion somehow ignored the statutory presumption of correctness. On the contrary, Judge Gibson quarrels with the majority's interpretation of reasonableness.

Respondent submits that the Court herein has not ignored the statutory presumption of correctness, 28 U.S.C. §2254(D), and that its decision properly applies the guidelines of Strickland v. Washington, supra. Therefore, this Court should deny certiorari.

III

COURTS OF APPEAL MUST APPLY THE GUIDELINES OF STRICKLAND V. WASHINGTON TO THE FACTS AND CIRCUMSTANCES OF EACH INDIVIDUAL CASE TO DETERMINE EFFECTIVENESS OF COUNSEL; SUCH COURTS DO NOT CREATE "PER SE" RULES SIMPLY BY DOING SO.

In the case at bar, the Eighth Circuit Court of Appeals clearly and unequivocally applied the standards for determining an ineffective assistance of counsel claim as set out in Strickland v.

Washington, supra. See Chambers v. Armontrout, supra.

Petitioner attempts to argue that by ruling Respondent's trial counsel ineffective herein, the Eighth Circuit creates "per se" rules requiring counsel to put forth certain affirmative defenses and to call certain witnesses. Nothing can be clearer than the principle that there are no absolute rules for what constitutes effective assistance of counsel. Strickland, supra at 688. Each case with an ineffectiveness claim must be judged on its own facts and circumstances. Id at 689-690, and that is precisely what was done in this case.

The Eighth Circuit Court of Appeals made a determination, pursuant to Strickland, that Respondent's counsel limited his investigation in a manner not supported by a reasonable professional judgment. (Petitioner's Appendix, A-8). The court makes clear that this decision is unreasonable in view of the unique and cumulative facts of this case. (Petitioner's Appendix, A-8 - A-13).

Respondent never contended that he didn't shoot the victim. Jones was the only person to see the entire altercation outside the bar. Without Jones' testimony, the only picture for the jury was that the victim walked outside the bar and Respondent shot him. Respondent's counsel called no witnesses on Respondent's behalf, yet tried to put forth the defense of self-defense. (Petitioner's Appendix A-11). Yet the Missouri Supreme Court had expressly ruled that Jones' testimony at the first trial justified the self-defense instruction which was not given. (Petitioner's Appendix, A-9).

Furthermore, all of the allegedly damaging portions of Jones' testimony from the first trial were cumulative to the testimony offered by state's witnesses. (Petitioner's Appendix A-10, A-11). Under these circumstances, the Court held, counsel's decision not to even interview this readily available witness was not reasonable. (Petitioner's Appendix, A-13). The court further held that counsel's failure to call Jones was only as reasonable or unreasonable as his decision not to interview Jones. (Petitioner's Appendix, A-13). This clearly follows the parameters of Strickland. Choices made after less than complete investigation are reasonable "to the extent that reasonable professional judgment supports the limitations on investigation." Strickland v. Washington, supra, at 690-691.

If a court is not entitled to apply these standards to the facts of each case without being accused of promulgating "per se" rules, how could any court review an ineffectiveness claim? In that event, if the Eighth Circuit had ruled against Respondent, Respondent could claim the Court was adopting a "per se" rule that attorneys don't have to investigate affirmative defenses in any case where there is a transcript of prior testimony. Once again, these determinations must be made on a case by case basis.

The Eighth Circuit has already held that just because it rules in one case that a failure to interview witnesses constitutes ineffective assistance, it does not adopt a "per se" rule that the same class of witnesses must be interviewed in every case. Langston v. Wyrick, 698 F.2d 926, 931 (8th Cir. 1982). See also

Harris v. Reed, 894 F.2d 871 (7th Cir. 1990).

Petitioner further argues that the Eighth Circuit misapplied the prejudice prong of the Strickland test, however, Petitioner completely misstates the law of the case in the process.

It is not speculation that if Jones had testified, a self-defense instruction would have been given. It is absolutely clear that Jones' testimony from the first trial is the testimony which required a self-defense instruction to be given. State v. Chambers, 671 S.W.2d 781 (Mo.banc 1984). This proposition must be considered the law of the case. Choate v. State Dept. of Public Health & Welfare, 296 S.W.2d 189, 194 (Mo.App.S.D. 1956). If Respondent had been allowed to argue self-defense to the jury, the jury could have found, at least, that Respondent was provoked in such a manner as to justify convicting him on the charge of manslaughter or second degree murder, or could have found this to be a mitigating circumstance at the sentencing phase of the trial. The jury was not only deprived of the evidence that the victim attacked Respondent, they were deprived of the force of that argument on closing statement, that Respondent was provoked in this manner.

It is highly illogical to claim that a jury in a fair trial, given the instructions and closing argument to which the Defendant is constitutionally entitled, will necessarily reach the same result as a jury which is deprived of these instructions and argument. This is how Petitioner argues that Respondent was not prejudiced by counsel's omissions, because Respondent was convicted

by the jury in his first trial. In the instant case, the Eighth Circuit carefully applied the prejudice prong of the Strickland standard to the facts of this case. (Petitioner's Appendix, A-16). The court clearly and correctly followed Strickland, finding that if Jones had testified, there is a reasonable probability that "the result would have been different." Strickland, supra, at 694-695. Petitioner's Appendix, A-16.

Finally, Petitioner claims that this decision creates a conflict with the Fifth Circuit U.S. Court of Appeals' decision in Bell v. Lynaugh, 828 F.2d 1085 (5th Cir. 1987). It is true that Bell dealt with counsel's decisions not to put forth the defense of diminished capacity which had been used in Defendant's prior trial for a related murder. This ignores, however, the crucial point that in Bell there is no suggestion that the jury was not properly instructed as to this defense at Bell's prior trial. In the instant case, the jury was not even allowed to consider the defense put forth, Respondent's only defense, at his first trial.

In addition, in the Bell case, presentation of this defense would bring independently damaging evidence in front of the jury which would not otherwise be at issue. 828 F.2d at 1090. This gives counsel a reasonable basis for his decision not to put evidence of diminished capacity in issue. This is in stark contrast to the case at bar, where the missing evidence directly contradicts the state's evidence, is presented by the only eyewitness to the most important parts of the incident, and where the "damaging portions" of the missing testimony are all things

that were testified to by state's witnesses. This case creates no conflict among the circuits.

The State of Missouri seeks to create chaos of judicial review by requiring the appellate court to apply Strickland, and accusing them of creating a "per se" rule when they do so. Therefore, Petitioner's Petition For Writ of Certiorari should be denied.

CONCLUSION

The Eighth Circuit in this case meticulously set forth the Strickland v. Washington standards for judging an ineffectiveness claim and applied the facts hereto to these standards. For all of the foregoing reasons, the Respondent respectfully suggests that Petitioner's Petition For A Writ of Certiorari should be denied.

Respectfully Submitted,

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